117-367

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 7 Original.

EX PARTE: — IN THE MATTER OF THE PHŒNIX INSURANCE COMPANY, OF LONDON, ENGLAND; THE GUARDIAN FIRE AND LIFE INSURANCE COMPANY, OF LONDON, ENGLAND; THE NORTH BRITISH MERCANTILE INSURANCE COMPANY, OF LONDON, ENGLAND, AND EDINBURG, SCOTLAND; AND THE COMMERCIAL UNION ASSURANCE COMPANY, OF LONDON, ENGLAND, PETITIONERS.

PETITION FOR A WRIT OF MANDAMUS.

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PETITION FOR A WRIT OF MANDAMUS.

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To the honorable the justices of the Supreme Court of the United States:

Respectfully represent the Phœnix Insurance Company, of London, England; The Guardian Fire and Life Insurance Company, London, England; the North British Mercantile Insurance Company, of London, England, and Edinburg, Scotland, & The Commercial Union Assurance Company, of London, England, each a body corporate duly organized by law of the United Kingdom of Great Britain and Ireland, each a citizen of said United Kingdom, and each now found and doing business in the State and district of Vermont, United States of America; that Robert Fitton, of Cavendish, in the county of Windsor, in said State and district of Vermont, and Helen M. Fitton, of the same Cavendish, wife of the said Robert, and both citizens of said State and District, on the twenty-first day of February, A. D. 1884, in the circuit court of the United States, in said district, filed their bill in equity against your petitioners and the Fire Insurance Association (limited), of London, England, likewise a body corporate under the laws of said United Kingdom, and a citizen thereof, then found and doing business within said State and district, complaining that the said Helen M. Fitton had for a long time before the twentieth day of August, A. D. 1883, been, and then was, the owner in fee of a certain mill property, fixed and movable machinery, boilers, and an engine, in all of the value of eighteen thousand dollars; that your petitioners and said Fire Insurance Association (limited) were, on said twentieth day of August, A. D. 1883, licensed and authorized, under the laws of Vermont, to transact insurance business in said State of Vermont, and were transacting business therein by their duly authorized agents, Sydney H. Sherman and C. F. R. Jenne, of Brattleborough, in said State, partners under the name of Sherman & Jenne, who were empowered as such agents to make binding contracts of insurance and to write and issue policies thereon; that on said twentieth day of August, A. D. 1883, the said Helen M. Fitton, acting by her agent, the said Robert Fitton, made a binding contract of insurance of said property with your petitioners, acting by their said agents, Sherman & Jenne, for twelve thousand dollars, to wit: on buildings, four thousand dollars; on fixed and movable machinery, &c., seven thousand and five hundred dollars, and on boilers and engine five hundred dollars, a memorandum of which said agreement of insurance was then made and delivered to said Robert Fitton for said Helen M. Filton, in writing, as follows:

"BRATTLEBOROUGH, VT., *August* 20, 1883.

"Mrs. Helen M. Fitton, Proctorville, Vt.

"DEAR MADAM: We hereby agree to bind from date twelve thousand dollars of insurance on woolen mill and machinery at Cambridgeport, as per survey on file at our office, in the North British and Mercantile, Commercial Union, Guardian, and Phœnix, of London, insurance companies, at three per cent.

"(Signed) SHERMAN & JENNE, *Agents.*"

That on the twenty-fifth day of August, A. D. 1883, the property so insured was destroyed by fire; that the loss was total and exceeded twelve thousand dollars in all, and upon each division of property named the sum insured thereon; that on the twenty-seventh day of the same August the said Sherman & Jenne wrote for the said Helen M. Fitton five policies of insurance upon the said property, each for one-fifth of twelve thousand dollars, all concurrent, one in each of the petitioning companes and one in the said Fire Insurance Association (limited); that said policies were never delivered; that they were demanded of the said Sherman & Jenne by the said Helen M. Fitton, with tender of the premiums, and delivery was refused; that due proof of loss was made by the said Helen M. Fitton under said policies. Wherefore the said Robert and Helen M. Fitton, in their said bill, prayed for process
5 for discovery for the delivery of the said policies to the said Helen M., that the defendants in said bill might be decreed to pay to the said Helen M. the sum of twelve thousand dollars so insured on said property, and for other and further relief.

And your petitioners further represent that they and the said Fire Insurance Association (limited), after service of due process upon them, all appeared in said circuit court; that petitioners filed a joint demurrer, setting forth, first, that the said bill stated no case in equity for discovery or relief; second, that the plaintiffs in the bill had a full and adequate remedy at law; third, that the bill was multifarious; fourth, that the grounds upon which relief was sought were vague, indefinite, and uncertain; that the said Fire Insurance Association (limited) filed a like demurrer, containing the additional ground that it was misjoined with the other defendants in the bill.

These demurrers were thereafter heard by the court, the Honorable Hoyt H. Wheeler, district judge *for* the United States
6 for said district, presiding, and were disposed of by the judgment of said court thereon, to wit: The demurrer of said Fire Insurance Association (limited) was sustained, and from that time it ceased to be a party to the cause. The demurrer of these petitioners was overruled, with leave to answer over. From this judgment overruling their demurrer these petitioners entered an appeal, and on the nineteenth day of August, A. D. 1884, severally filed the same answer as defendants in the said equity suit, which answers, among other things, not germane to this petition, put in issue the alleged title of the said Helen M. Fitton to the property aforesaid, averred that the property was destroyed, or procured to be destroyed, by the wrongful, wilful, negligent, or unlawful act of the complainants; and further averred that the agreement of insurance alleged in the bill to have been made was procured by the said Helen M. Fitton and her agent, Robert Fitton, by fraudulent representations and concealments set forth in the said answers. Whereupon, thereafter, upon motion of the petitioners, defendants in said equity suit, it was ordered by the said court, the said
7 honorable district judge presiding, that the following issues of fact be submitted for determination by a jury on the law side of said court:

First. Did the complainant Robert Fitton, for himself or for complainant Helen M. Fitton, procure by fraudulent representations or concealments whatever agreement or agreements they entered into with the defendant companies to insure the destroyed property?

Second. Was the property destroyed, or procured to be destroyed, by the wrongful, willful, negligent, or unlawful act of the complainants, or either of them, with intent to defraud the defendants?

Third. Was Helen M. Fitton the real owner of the property claimed to have been insured?

Thereafter, at the May term of said circuit court, A. D. 1885, trial was had before a jury duly impannelled upon the issues so submitted for determination, the Honorable W. J. Wallace, the circuit judge of said circuit court, and the Honorable Hoyt H. Wheeler, district judge aforesaid, presiding.

8 In the course of said trial these petitioners, defendants at the said trial, made a common defence, and offered certain evidence as bearing upon the issues tried, which the said court excluded, as inadmissable, to which rulings, three in number, these petitioners, there defendants, excepted, and their exceptions were thereupon reduced to writing, allowed by the court, and placed on file.

In the course of the said trial *to* the jury the questions to be answered by them were modified in form by the court in a manner and for reasons fully appearing in the aforesaid exceptions, and the verdict of the jury was adverse to the defendants (your petitioners) and was as follows: "Did Robert Fitton at the time of applying for insurance falsely represent to the agents of the defendants that he had only had one fire?" Answer. "No." "Did he so represent intending to deceive them or defraud the defendants?" Answer. "No." "Was the representation relied upon by the agents in effecting the agreement of insurance?" Answer. "No."

9 "And that there was no other misrepresentations or concealments." And they further answer the second question submitted in the negative, and the third in the affirmative, under the direction of the court."

The foregoing verdict was received by the court and filed on May the twenty-second, A. D. 1885, and thereafter, upon the seventh day of July, 1885, the cause was sent to a master to assess the damages, and by the said master's report, returned into court at the October term, to wit, October 10th, 1885, the damages suffered by the complainant were assessed at a sum greater than the said twelve thousand dollars, the sum at which the said property was alleged to have been insured, to wit, the sum of fourteen thousand three hundred and thirty-three dollars.

10 Thereafter during the October term of said circuit court, 1885, the complainants in said bill moved for a judgment against each of the respondents for three thousand dollars (being one-fourth of the said sum of twelve thousand dollars), with interest and one-fourth of the costs of the suit, which motion, after the parties had been duly heard thereon, was granted by the court in an opinion filed by the aforesaid district judge December 29th, 1885,

closing with the following decretal order: "Let a decree for the orators be entered for the payments by the defendants each, respectively, to the oratrix of three thousand dollars, with interest and one-fourth of the costs of suit within thirty days from the entry of the decree."

And thereafter, at the same term, to wit, on the twenty-sixth day of January, A. D. 1886, the said Honorable Hoyt H. Wheeler, district judge, presiding, on motion of the complainants in said suit the following final decree was entered:

11 This cause came on to be further heard at this term, and was argued by counsel, and thereupon, upon consideration thereof—

It was ordered, adjudged, and decreed that each of said defendants pay to said oratrix the sum of three thousand dollars, with interest thereon from the 29th day of August, A. D. 1883, amounting to the sum of three thousand four hundred and thirty-three dollars and fifty cents; that each of said defendants pay to said orators one-fourth of the orators' costs in and about this suit, *and* one-fourth being taxed and allowed at the sum of one hundred and seven dollars and sixty-one cents, said sum due in equity, and said costs, amounting to the sum of three thousand five hundred and forty-one dollars and eleven cents, and which said sum it is ordered, adjudged, and decreed shall be paid to said orators within thirty days from the twenty-sixth day of January, A. D. 1886, with interest from this last-named date to the time of payment, and thereof the said orators may have execution at the expiration of said thirty days against each of said defendants.

Done in court, in said term, this 26th day of January, A. D. 1886.

HOYT H. WHEELER.

12 And on the same 26th day of January, A. D. 1886, upon the entry of the foregoing decree, the defendants moved the court as follows:

And now come the defendants in the above-entitled cause and move the court that an appeal be allowed and execution stayed that the cause may pass to the Supreme Court, and offer to give a bond, as required by law in such cases, and move the court to fix the amount therefor.

By MARTIN & EDDY,
Att'ys for Def'ts.

Which motion was disallowed, the court endorsing thereon its order as follows:

"Appeal disallowed in open court solely upon the ground that, in the opinion of the court, the cause is not appealable.

"HOYT H. WHEELER."

13 All of which matters and things hereinabove stated appear of record in said court. And your petitioners file with this their petition, in support and in proof thereof, attested copies of the papers, as follows: The bill marked Exhibit "A;" the demurrer

of these petitioners, marked Exhibit "B;" the demurrer of the Fire Insurance Association, marked Exhibit "C;" the answer of the Phœnix Assurance Company, marked Exhibit "D" (the answers of the other defendants being the same); the order sending issues to a jury, marked Exhibit "E;" the exceptions of the defendants allowed at the trial by the jury, marked Exhibit "F;" the verdict of the jury, marked Exhibit "G;" the opinions of the court in the cause at its various stages, with the decretal order in the last opinion, marked respectively Exhibits "I," "K," & "L;" the decree, marked Exhibit "M;" the motion for appeal, with the indorsement disallowing the same, marked Exhibit "N."

14 And now your petitioners, upon the above-recited facts, allege that they had the right of appeal from the final decree of the circuit court aforesaid in said cause to the Supreme Court of the United States, and that they are wrongfully deprived of said appeal by the order aforesaid disallowing the same as matter of law, and that said order is erroneous, and the petitioners have a right thereupon to the interposition of this honorable court in their behalf.

Wherefore they respectfully pray this honorable court to issue its writ of mandamus to the judges of the said circuit court, district of Vermont, commanding them, or one of them, to grant your petitioners an appeal to this court from the decrees and rulings of the said circuit court in said cause and to accept sufficient bond or bonds to act as a supersedeas, and that such appeal be allowed as of the 26th of January, A. D. 1886, the date when said application was

15 originally made in said court and was rejected.

Geo 7 d. for all th

STATE OF VERMONT, }
County of Windham, } *ss:*

James L. Martin, of Brattleborough, in said county, being deposes and says that he is one of the attorneys of record for the defendants in the equity suit against Phœnix Assurance Company, London, England, *& als.*, in favor of Robert Fitton and wife, now pending in the United States circuit court, district of Vermont, and, as such, has been familiar with all of the proceedings in said cause; that he is acquainted with the contents of the foregoing petition, and the same are true in matters of fact.

JAMES L. MARTIN.

DISTRICT OF VERMONT, *ss:*

Subscribed and sworn to before me this 13th day of February, A. D. 1886.

HOYT H. WHEELER,
District Judge, District of Vermont.

[Endorsed:] The Phœnix Assurance Co., of London, England, & *al. vs.* Robert Fitton & *ux.* Petition for mandamus to the circuit court of U. S., district of Vermont.

16 To the judges of the circuit court of the United States for the district of Vermont, in the second circuit:

Robert Fitton, of Cavendish, in the county of Windsor and State of Vermont, [and] Helen M. Fitton, of the same town, county, and State, wife of the said Robert Fitton, and citizens of the State of Vermont, bring this their bill of complaint against The Fire Insurance Association (limited), of London, England, a body corporate duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, and a citizen of said kingdon, now found and doing business within the said district of Vermont; The Phœnix Assurance Company, of London, England, a body corporate organized and existing under the laws of said United Kingdom of Great Britain and Ireland, and a citizen of said kingdom, now found and doing business in the said district of Vermont; The Guardian Fire & Life Assurance Company, of London, England, a body corporate duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, and a citizen of said kingdom,
17 now found and doing business within the said district of Vermont; The North British and Mercantile Insurance Company, of London, England, and Edinburg, Scotland, a body corporate duly organized and existing under the laws of said United Kingdom of Great Britain and Ireland, and a citizen of said United Kingdom, now found and doing business in the said district of Vermont, and The Commercial Union Assurance Company, of London, England, a body corporate duly organized and existing under the laws of said United Kingdom of Great Britain and Ireland, and a citizen of said United Kingdom, now found and doind business in the said district of Vermont.

1. And thereupon your orators complain and say that on the 20th day of August, A. D. 1883, the said Helen M. Fitton was, and for a long time had been, the owner in fee of three buildings built of stone, brick, and wood, connected together, and extending some one hundred and sixty-five feet, east and west, on the north side of the highway, in the village of Cambridgeport, in the town of Rocking-
18 ham, in the county of Windham and State of Vermont, of great value, to wit, of the value of six thousand dollars, and of fixed and movable machinery therein, not including boilers and engine, but including hangers and shafting, pulleys, and belting, and factory furniture and fixtures, all of great value, to wit, of the value of ten thousand dollars; and that she also owned in said building two boilers and one engine, with connections, of great value, to wit, of the value of two thousand dollars; all of which property was the sole and separate estate of said Helen M. Fitton, was free and clear of all incumbrance, and was rented for and used as a woolen factory in the manufacture of woolen goods.

2. Your orators further show that on said 20th day of August, A. D. 1883, and for a long time prior thereto the said defendants, to wit, The Fire Insurance Association (limited), of London, England; The Phœnix Assurance Company, of London, England; The Guardian Fire and Life Assurance Company, of London, England; The

North British and Mercantile Insurance Company, of London,
19 England, and Edinburgh, Scotland, and The Commercial Union Assurance Company, of London, England, were each duly organized corporations for the purpose of insuring the owners of buildings and property therein against loss and damage by fire, and were not organized under the laws of the State of Vermont, but had, prior to said 20th day of August, A. D. 1883, applied to and obtained a license from the insurance commissioners of the State of Vermont, authorizing each of said insurance companies and corporations to transact insurance business in the State of Vermont, and each of said corporations had filed with the secretary of state of the State of Vermont the copies and statements required by law to entitle it to obtain said license; and that among the said certificates and statements each of said defendants had filed with said secretary of state a written stipulation agreeing that legal process affecting said company served on either of the insurance commissioners of the State of Vermont should have the same effect as if served personally on the corporations within this State; and that each
20 of said defendants had duly appointed as its agents to make contracts of insurance upon buildings and property therein against loss and damage by fire, for the State of Vermont or in a part thereof, Sidney H. Sherman and C. F. R. Jenne, of Brattleborough, in the county of Windham, partners in business under the firm name of Sherman & Jenne, and had authorized and empowered said agents to make building contracts for such insurance, and to write and issue policies upon said contracts; all which licenses and authorizations were in full force and effect on said 20th day of August, A. D. 1883, and said Sherman & Jenne, on that date and ever since, have had full authority to bind each of said defendants for insurance against loss and damage by fire by contracts and policies by them to be made and issued.

3. Your orators further show that on said 20th day of August, A. D. 1883, the said Robert Fitton, acting as agent for and in behalf of his wife, the said Helen M. Fitton, made application to said Sherman & Jenne for insurance to said Helen M. Fitton upon her said property as follows:

21 On stone, brick, & frame buildings	$4,000 00
On fixed and movable machinery therein, exclusive of boilers & engines, including hangers and shafting, pulleys and belting, and factory furniture and fixtures therein	$7,500 00
On 2 boilers and engine and connections	$500 00

Which said application was in writing filled into a printed blank and contained a full and particular survey of the property, and had endorsed thereon a plan of said buildings and their surroundings, and was satisfactory to and was approved by said Sherman & Jenne, agents as aforesaid; which said application, money, and plan are referred to and the orators will produce and send an accurate copy thereof as a part of this bill of complaint upon the trial of this cause.

4. Your orators further show that said Sherman & Jenne, as agents as aforesaid, and acting within their authority to make contracts for insurance as aforesaid, accepted said application and agreed that the companies named in the written memorandum next
22 hereinafter recited should insure said property described in said survey and aplication to said Helen M. Fitton against loss or damage by fire to an amount not exceeding twelve thousand dollars, in consideration of the sum of three hundred and sixty dollars premium, and that one of said firm of Sherman & Jenne would visit said property on the 25th day of August, A. D. 1883, and that policies would then be written dated the 20th day of August, A. D. 1883, and would be sent to said Helen M. Fitton immediately thereafter, and that she should cause a check for the amount of said premiums to be returned at once to said Sherman & Jenne on receipt of said policies; that in a memorandum of the agreement to insure said property said Sherman & Jenne, as agents as aforesaid, made and delivered to said Robert Fitton for said Helen M. Fitton the following letter, to wit:

"BRATTLEBOROUGH VT., *Aug.* 20, 1883.

"Mrs. Helen M. Fitton, Proctorsville, Vt.

"DEAR MADAM: We hereby agree to bind from date twelve thou-
sand dollars of insurance on woolen mill and machinery at
23 Cambridgeport, as per survey on file at our office, in the North British and Mercantile, Commercial Union, Guardian, and Phœnix, of London, insurance companies, at three per cent.

"SHERMAN & JENNE, *Agents.*"

Your orators further show that the companies named in said memorandum are the defendants in this suit, except the Fire Insurance Association (limited), of London, England, and was a valid contract, binding upon all the corporations named in it.

5. Your orators further show that, in accordance with said agreement, the said Jenne, one of said firm of Sherman & Jenne, on said 25th day of August, A. D. 1883, visited and examined said buildings and property at said Cambridgeport, and again promised said Robert Fitton, as agent for his said wife, that said policies would be written and forwarded to said Helen M. Fitton, as hereinbefore stated, and said Robert Fitton again assured said Jenne that said premium would be sent, as before stated, on receipt of said policies.

24 6. Your orators further show that upon the night of said 25th day of August, A. D. 1883, the said buildings, machinery, hangers, pulleys, shafting, belting, boilers, engine, furniture, and fixtures were entirely consumed by fire, and all said property was burned up and destroyed and became a total loss, and all without the fault of said Robert or said Helen M. Fitton, and that said loss greatly exceeded the sum of twelve thousand dollars in amount, and exceeded upon each division of said property named and specified in said survey the sum named therein.

7. Your orators further show that after said 25 day of August, A.

D. 1883, to wit, on the 27th day of the same August, the said Sherman & Jenne, as agents as aforesaid, and in pursuance of the terms of said contract, made out formal and complete policies of insurance to said Helen M. Fitton upon said property, as set forth and described in said application in the defendant corporations, to wit, The Fire Insurance Association (limited), of London, England; The
25 Phœnix Assurance Company, of London, England; The Guardian Fire and Life Assurance Company, of London, England; The North British and Mercantile Insurance Company, of London, England, and Edinburgh, Scotland, and the Commercial Union Assurance Company, of London, England; all which said policies were written upon the blank forms furnished by the defendant corporations, respectively, and were concurrent upon said property, and were each dated on the 20th day of August, A. D. 1883, being the time of making said contract and the date of said memorandum, and each of said policies was for an equal one-fifth of said sum of twelve thousand dollars, and of the several divisions made and set forth in said application, and followed said application in all respects, except that permission was given to run said factory extra time, not later than ten o'clock p. m., to even up work.

8. Your orators further show that said policies were not delivered by said Sherman & Jenne to said Helen M. Fitton, nor to her said husband, and that on the 29th day of August, A. D. 1883,
26 said Robert Fitton, in behalf of his said wife, tendered to said Sherman & Jenne, for the defendants, the sum of three hundred and sixty dollars for the premium upon said policies and for said insurance, and demanded policies according to said written memorandum, and demanded the policies written as aforesaid; that said Sherman & Jenne refused to accept said premium and refused to deliver said policies, or to otherwise carry out said contract; that said Helen M. Fitton then gave notice of said loss by said fire, and afterwards, on the 21st day of September, A. D. 1883, she caused to be made out and delivered to said Sherman & Jenne sworn proofs of loss, stating all the particulars of said fire and said loss, so far as she had any knowledge thereof, for each of the four defendants named in said memorandum of said contract; and on the 10th day of November, A. D. 1883, she also made and caused to be delivered to said Sherman & Jenne a like proof of loss for the other
27 company not named in said memorandum, in which a policy was written. And said Robert Fitton, for and in behalf of said Helen M. Fitton, has made frequent demand for said policies and for the payment of the amount of said loss; and the defendants, through their said agents, wholly refuse to deliver said policies or to pay said loss, or any part thereof.

9. Your orators further show that they have never had possession of said policies, and that they have never read nor been informed of the formal parts of said policies, but that your orators have endeavored in good faith to obtain the same and to comply with all terms and conditions to make their said insurance on said property of said Helen M. available as a protection, and to secure the indemnity contracted for as aforesaid; and if they have in any wise failed

to do and perform all the conditions of said policies, it has been entirely due to the wrongful refusal of the defendants to deliver said policies, or otherwise inform your orators of the said conditions.

10. But now so it is, &c.

11. And the defendants sometimes allege, &c.

28 12. All which actings, doings, &c.

13. In consideration whereof, &c.

14. To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the matters and things hereinbefore set forth and charged, and that as fully and particularly as though the same was here repeated, and they, and each of them, particularly interrogated thereto, and that each of said defendants set forth and discover the said policies of insurance written by said defendants respectively, and all correspondence, memoranda, book entries, and papers relating to the same, and that said defendants produce said original policies that they may be delivered to said Helen M., and that the defendants be decreed to pay to the said Helen M. the said sum of twelve thousand dollars, the sum so by said defend-

29 ants insured upon said property by their said concurrent policies, and that they contribute thereto in the same proportion as they assumed the same in said contract and policies, with interest thereon, and for such other and further relief in the premises as to justice and equity shall appertain and to your honors shall seem meet.

May it please your honors to grant unto your orators a writ of subpœna directed to the Fire Insurance Association (limited), of London, England; the Phœnix Assurance Company, of London, England; the Guardian Fire and Life Assurance Company, of London, England; the North British and Mercantile Insurance Company, of London, England, and Edinburgh, Scotland, and the Commercial Union Assurance Company, of London, England, commanding them, and each of them, that they appear before the honorable circuit court of the United States for the district of Vermont, at the time to be appointed therein, in accordance with the rules in equity, then and there to make answer hereto, and stand to and abide the order and decree of the court in the premises.

30 And your orators will ever pray.

ROBERT FITTON.
HELEN M. FITTON.
WALKER & GODDARD,
Solicitors.

CLERK'S OFFICE,
U. S. CIRCUIT COURT, DISTRICT OF VERMONT.

I hereby certify that the foregoing is a true copy of the original now on file in this office.

[Seal Circuit Court, Vermont District, U. S. A.]

GEO. E. JOHNSON, Clerk.
By A. A. Augustus, A.
Deputy.

31 [Endorsed:] Exhibit "A." Circuit court of U. S. Robert Fitton & Wife *v.* Fire Ins. Association *et als.* District of Vermont. In equity. Walker & Goddard, solicitors. Filed February 21st, 1884. Geo. E. Johnson, deputy clerk. Copy.

32 *Demurrer.*

Circuit Court of the United States, District of Vermont. In Equity.

ROBERT FITTON & WIFE
vs.
THE FIRE INSURANCE ASSO., &c., and Others.

The Guardian Fire & Life Assurance Company, The North British & Mercantile Insurance Company, The Commercial Union Assurance Company, and the Phœnix Assurance Company, four of the defendants in the above suit, by protestation not confessing or acknowledging all or any of the matters and things in the bill set forth in manner and form as the same are alleged, doth demur thereto, and for cause of demurrer showeth—

1st. That the said complainants have not in their said bill made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for against these defendants, nor have they set forth any case calling for relief in a court of equity.

33 2d. That the complainants, upon the facts set forth in their said bill, are not entitled to the relief prayed for, because they have a full and adequate remedy at law.

3d. That the said bill exhibited against these defendants and another corporation appears upon its face to invoke several and distinct matters and causes, in several of which these defendants and the said other corporation- defendant are not alike interested or concerned, and that the said bill is altogether multifarious.

4th. That the bill exhibited against these defendants does not clearly and explicitly set forth the contract or the transaction on which the complainants rely as their cause of action, and does not set forth with certainty any distinct grounds upon which their alleged equity is founded, and is vague, indefinite, and uncertain.

Wherefore these defendants demand judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill, or to any of the matters and things

34 therein contained, and pray to be hence dismissed with costs.

THE GUARDIAN FIRE & LIFE ASSURANCE CO.
THE NORTH BRITISH & MERCANTILE INS. CO.
THE COMMERCIAL UNION ASSURANCE CO.
THE PHŒNIX ASSURANCE CO.,
solicitors, MARTIN & EDDY.

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We certify that, in our opinion, the foregoing demurrer is well founded in point of law.

MARTIN & EDDY,
Of Counsel.

STATE OF NEW YORK, *City & County of New York:*

We, James S. Swan, deputy manager of the Guardian Fire & Life Assurance Company, of London; Samuel P. Blagden, manager of the North British & Mercantile Insurance Company, of London & Edinburgh; Charles Sewall, associate manager of the Commercial Union Assurance Company, of London, and E. B. Clark, assistant manager of the Phœnix Assurance Company, of London, being duly sworn, on oath depose that they hold severally the respective offices set forth herein in the management of the affairs & business
35 of the said insurance companies in the United States, and that the foregoing demurrer is not intended for delay.

GUARDIAN FIRE & LIFE ASSURANCE CO., LONDON,
JAS. S. SWAN, *Deputy Manager.*
NORTH BRITISH & MERCANTILE INS. CO.,
SAM. P. BLAGDEN, *Manager.*
COMMERCIAL UNION ASSURANCE CO.,
CHARLES SEWALL, *Ass't M'g'r.*
PHŒNIX ASSURANCE CO. OF LONDON,
E. B. CLARK, *Ass't Manager.*

Subscribed and sworn to this fifth day of May, A. D. 1884, before me.

[L. S.] WM. DE L. BOUGHTON,
Notary Public, City & Co. of N. Y.

CLERK'S OFFICE, U. S. CIRCUIT COURT,
DISTRICT OF VERMONT.

I hereby certify that the above and foregoing is a true copy of the original now on file in this office.

[Seal Circuit Court, Vermont District, U. S. A.]

GEO. E. JOHNSON,
Deputy Clerk.

36 [Endorsed:] Exhibit "B." Robert Fitton & Wife *vs.* The Fire Insurance Asso. & *als.* In equity. Demurrer of Guardian, North British & Mercantile, Commercial Union, & Phœnix Cos. Filed May 8, 1884. Geo. E. Johnson, deputy clerk. Copy.

37 Circuit Court of the United States, District of Vermont. In Equity.

ROBERT FITTON & WIFE *vs.* FIRE INSURANCE ASSOCIATION *et als.*

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill set forth to be true in such manner and form as the same are therein

set forth and alleged, doth demur thereto, and for cause of demurrer showeth:

1. That the said complainants have not, in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

2. That the complainants, upon the facts stated in said bill, are not entitled to the relief prayed for against this defendant because they have a plain and adequate remedy at law.

3. That the said bill is exhibited against this defendant
38 and the several other corporations therein named as defendants thereto for distinct matters and causes, in several whereof, as appears by said bill, this defendant is not in any manner interested or concerned, and that the said bill is altogether multifarious.

4. That there is a misjoinder of parties to said cause in this that this defendant is improperly joined with said several other defendants as parties to said bill.

Wherefore this defendant demands the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill, or to any of the matters and things therein contained, and prays to be hence dismissed with costs.

THE FIRE INSURANCE ASSOCIATION (LIMITED) OF LONDON,
By PROUT & WALKER, *Its Solicitors.*

We certify that in our opinion the foregoing demurrer is well founded in point of law.

PROUT & WALKER,
Of Counsel.

39 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Joseph H. Wellman, being duly sworn, on oath says that he is manager in the United States of the Fire Insurance Association (Limited), of England, and that the foregoing demurrer is not interposed for delay.

JO. H. WELLMAN,
Manager The Fire Ins. Asso., Lim.

Subscribed and sworn to before me this 29th day of April, A. D. 1884.

[L. S.]

J. G. BALDWIN,
Notary Public in & for New York County, No. 2.

CLERK'S OFFICE, U. S. CIRCUIT COURT,
DISTRICT OF VERMONT.

I hereby certify that the above and foregoing is a true copy of the original now on file in this office.

[Seal Circuit Court, Vermont District, U. S. A.]

GEO. E. JOHNSON,
Deputy Clerk.

40 [Endorsed:] Exhibit C. U. S. circuit court, district of Vermont. Robert Fitton & Wife *vs.* Fire Ins. Asso'n *et al.* In equity. Demurrer to bill by Fire Ins. Asso'n. Filed May 5, 1884. Geo. E. Johnson, deputy clerk. Copy.

41 DISTRICT OF VERMONT, *ss.*

Circuit Court of the United States. In Equity.

ROBERT FITTON and Wife *vs.* FIRE INSURANCE ASSO. & *als.*

Answer of the Phœnix Assurance Company, now the Phœnix Assurance Company of London, England, one of the defendants in the above-named suit, not waiving but expressly reserving all right of exception to the bill, for answer thereto says:

1st. This defendant is ignorant whether the plaintiff, Helen M. Fitton, was the owner in fee of the lands and buildings of which it is alleged in the bill that she was the owner, or of the machinery and fixtures of various kinds which the bill refers to and sets forth, or whether all or any of such property, real or personal, was free from incumbrances, and was rented and used as a woolen factory, as alleged, and as to all those matters this defendant there-
42 fore neither admits or denies the same, but will require the plaintiffs' proof.

2nd. This defendant admits that it is a duly-incorporated company under the laws of the United Kingdom of Great Britain and Ireland, and was at the time referred to in the bill, and now is, doing business under the laws of the State of Vermont in said State, and was and is liable to service in the said State, and also that the firm of Sherman & Jenne, of Brattleborough, in said State, was agent of this defendant, as alleged in the bill to contract for insurance and write policies for this defendant.

3rd. This defendant is ignorant, but, upon information, denies all and several the allegations of the bill which allege and assert any agency whatever on the part of the plaintiff, Robert Fitton, for his wife, the plaintiff Helen M., and is also ignorant, but, upon information, denies that the plaintiff Robert, as agent for and on behalf of the plaintiff Helen, made such an application in writing to said Sherman & Jenne for insurance (filled into a printed blank) as
43 the bill alleges, or that any such an application was satisfactory to and approved by said Sherman & Jenne.

4th. This defendant, upon information and belief, being itself ignorant of the alleged transaction as it occurred, if any such there was, deny that said Sherman & Jennie, acting within the scope of their authority as agents of this defendant, accepted any such application and agreed, otherwise than by a writing signed by them, to effect any insurance for said Helen M. Fitton, to write any policies on any property for said Helen M. Fitton, or to deliver to said Helen M. Fitton any such policies for the amount of three hundred and fifty dollars premium, as is alleged in said bill, and that any insurance should be so effected for said Helen M. Fitton, and such policies should be delivered to her before she paid for the same, and

upon her promise, made by her husband, to send a check for such amount to said Sherman & Jenne; and this defendant denies all the other allegations in the fourth paragraph of the bill con-
44 tained except the allegation that Sherman & Jenne executed a paper writing and gave the same to said Robert Fitton, which fact it admits, but whether the said writing is truly and accurately set forth in the bill defendant is ignorant and will ask leave to verify the same when the original shall be produced in evidence.

5th. This defendant is informed, and therefore admits, that C. F. A. Jenne, of the said firm of Sherman & Jenne, visited the premises described in the bill on the 25th day of August, 1883, and saw the said building, but defendant denies that the said Jenne made any agreement with the said Robert or the said Helen M. at that time and place, such as is set forth in the bill.

6th. This defendant is ignorant, and therefore denies and leaves the plaintiff to prove, whether or not the real and personal property set forth in the sixth paragraph of the bill was destroyed by fire in whole or in part, as is therein alleged, and also the value of any property which may be proved to have been so destroyed.

45 7th. This defendant admits that the said Sherman & Jenne, on the 27th day of August aforesaid, wrote a policy in this defendant company, insuring the premises mentioned in the bill against fire, a copy of which policy this defendant annexes to this answer; but this defendant avers that the said policy was written by the said Sherman & Jenne in entire ignorance of the fact that the mill premises had been consumed in whole or in part by fire, as defendant is informed and believes, and in entire ignorance on the part of this defendant of the writing of said policy, or of any fire by which said premises were either injured or consumed. And this defendant further avers that the said policy was never delivered to the said Helen M. Fitton or to any person for her, but has been and is ever since in the possession of this defendant. And defendant says that the said Helen M. Fitton has never had and has not any right to have said policy delivered to her; has never paid for the same; has never tendered the money for the premium
46 thereof, and has never been insured, or had the right to consider herself insured thereby. And this defendant further denies that the plaintiff, Helen M., either herself or by another person for her, ever made any proper and legal proof of loss under said policy, or in any way within the prescribed and proper time or at any time. And the defendant denies each and every the other allegations of the bill in regard to the writing of said policy, the alleged tender of the premium money therefor, and the demand for the same not herein specifically either admitted or denied.

And this defendant further alleges that it has refused to deliver said policy to the said Helen M. if she has ever demanded the delivery of the same, and denies that the said Helen M. has ever performed all the terms and conditions of the contract which she in her bill alleges she made with this defendant, or that any failure to

perform her so alleged obligations was due to any wrongful refusal or conduct of this defendant.

47 8th. And this defendant is informed and believes, and therefore alleges, that the plaintiff, Robert Fitton, procured and caused all that was done by the said Sherman & Jenne in the premises, including the signing of the writing which was given to the said Robert Fitton (whatever the same may prove to be), the visit of the said Jenne to the property mentioned in the bill, and the writing of the said policy by false and fraudulent representation, and by intentional and fraudulent concealment of material facts, as the same are set forth below, to wit:

That said Robert Fitton did when he first called upon said Sherman & Jenne, and for the purpose of inducing them to make the written instrument on paper which they did make, and to induce them to enter into an arrangement to insure said mill and property, *did* knowingly and falsely and fraudulently represent to said Sherman & Jenne that there *was* in good condition and in good working order automatic sprinklers in the weave-room, card-room,

48 spinning-room, and in two stories in the "L" part of the mill attached to and connected with the main part of said mill by a three-inch water pipe; that said sprinklers were connected with and supplied with water from a large tank in an upper room in said mill, which tank was and would be kept filled and supplied with water thereafter, and that said sprinklers were so arranged that if the building took fire they would be put in operation and operated by the heat; that they had a barrel of water constantly on hand in the picker-room, together with four water pails, all handy and ready for immediate use in extinguishing fire, in case of fire in the mill; that there was also fifty feet of hose in each story and one hundred feet of hose in the office of said mill, which was and would be kept constantly on hand ready and in good and suitable condition for immediate use in extinguishing fire; that he also had a pump in the main building of said mill attached to the

49 machinery in said mill by gearing and propelled by water and which was and would be kept supplied by water and in a good and suitable condition for immediate use; that he had never had but one fire in which buildings were burned.

All of which representations of said Fitton this defendant, upon information and belief, alleges were false and fraudulent, and were falsely and fraudulently made by said Fitton for the purpose of inducing the said Sherman & Jenne to make said paper and to enter upon and do what they did in the premises.

And, further answering, says, upon information and belief, that said Sherman & Jenne did rely upon said representations of said Fitton and did believe them to be true, and was by them induced to make said paper and to enter upon and do what they did do in the premises.

And, further answering, says that at the time when said Fitton made said representations, and at the time when said mill

50 was burned, that there was very little, if any, water in said tank in said mill, and not enough to supply the said auto-

matic sprinklers or to put them in operation, so that the same were wholly useless; that by reason of the want of water in said tank said hose was rendered entirely useless at the time of said fire; that at the time said Fitton made said representations and at the time said fire began said pump in said mill was out of repair and in such condition that it could not be operated, and was wholly useless, and the said pump and the geering and machinery connected with the same and dam holding the water to propel the same, together with unreasonable and excessive use of the water by said Fitton in said dam, made said pump wholly inoperative and of no use whatever.

And this defendant, further answering, says that by reason of the want of a suitable supply of water in said tank, by reason of
51 the condition of said automatic sprinklers being in a condition so that they could not and would not operate, by reason of the want of water in the said tank so that the said hose could not be used, and by reason of said pump being out of repair and in a condition so that it could not be operated, and by reason of such unreasonable and excessive use of the water in said dam and the condition of said dam said mill and property was burned and destroyed.

And, further answering, upon information and belief, this defendant says that said mill was burned and said property destroyed by the wrongful, willful, and negligent acts of said orators.

And this defendant, further answering, says, upon information and belief, that said Fitton, in truth and in fact, had had at the time of making such representations and at the time of such supposed insurance of said property, a large number of fires, and at different times had had between fifteen and twenty buildings burned
52 up and destroyed by fire.

9th. And this defendant further is informed and believes and therefore alleges that any fire which occurred and any loss which ensured with respect to the premises and property mentioned in the bill was caused by the unlawful act or procurement of the plaintiff in setting fire to the said buildings, or in procuring the same to be fired, with the fraudulent purpose and intent to procure the insurance money and to defraud the defendant of the same.

And this defendant, on information and belief, further alleges that such fire and loss, if any, was caused by the unlawful act or procurement of the plaintiff, Robert Fitton, in setting such fire to the said buildings, or in procuring the same to be fired, with the like fraudulent purpose and with the knowledge and consent of the said Helen M., or as the agent of the said Helen M. in charge of the said property and of the management of the same and
53 of procuring the insurance thereon, for whose acts and doings the said Helen M. was responsible. and by the result whereof she is bound.

Wherefore this defendant says, all the premises being considered, the plaintiffs are not entitled to any of the relief from this honorable court for which they pray, or to any relief for which they do not specifically pray under the general prayer for equitable relief contained in the bill, and that this defendant is not required

to answer the bill further, but should be hence dismissed with its reasonable costs in this regard most unjustly sustained.

E. B. CLARK,
Asst. Manager Phœnix Assurance Co., London.

54 UNITED STATES OF AMERICA, }
State & County of New York, } ss:

On this fifteenth day of August, 1884, personally appeared before me, the subscriber, E. B. Clark, of the city of New York, the assistant manager of the Phœnix Assurance Company, by whom the above answer in equity is signed, and made oath that the allegations and statements in the above answer contained are true, so far as such allegations and answers are stated upon the knowledge of the answering defendant, and that so far as they are stated upon information and belief that he believes them to be true.

Witness my hand and official seal the day and year last above stated.

[L. S.] WM. DE L. BOUGHTON,
Notary Public, City & Co. of N. Y.

CLERK'S OFFICE, U. S. CIRCUIT COURT,
DISTRICT OF VERMONT.

I hereby certify that the above and foregoing is a true copy of the original now on file in this office.

[SEAL.] GEO. E. JOHNSON,
Deputy Clerk.

55 [Endorsed:] Exhibit "D." Robert Fitton & Wife *vs.* The Phœnix Assurance Co., of London & U. S. Answer of Phœnix Ass'e Co. Martin & Eddy, solicitors. Filed August 19th, 1884. Geo. E. Johnson, deputy clerk. Copy.

56 In the Circuit Court of the United States, District of Vermont
In Equity.

ROBERT FITTON and WIFE
vs.
THE NORTH BRITISH MERCANTILE INS. CO., OF LONDON, *et als.*

And now, after hearing the parties, it is ordered that the following issues of fact in the above-entitled cause be submitted for determination by a jury on the law side of this court:

1st. Did the complainant Robert Fitton, for himself or for complainant Helen M. Fitton, procure by fraudulent representations or concealments whatever agreement or agreements they entered into with the defendant companies to insure the destroyed property?

2d. Was the property destroyed or procured to be destroyed by the wrongful, willful, negligent, or unlawful act of the complainants, or either of them, with intent to defraud the defendants?

3d. Was Helen M. Fitton the real owner of the property claimed to have been insured?

57 To stand for trial without further notice thereof by either party to the other.

HOYT H. WHEELER.

CLERK'S OFFICE, U. S. CIRCUIT COURT,
DISTRICT OF VERMONT, BURLINGTON, *June 25th*, 1885.

I hereby certify that the above and foregoing is a true copy of the original now on file in this office.

[Seal Circuit Court, Vermont District, U. S. A.]

GEO. E. JOHNSON,
Deputy Clerk.

58 [Endorsed:] Exhibit "E." United States circuit court, district of Vermont. Robert Fitton & Wife *vs.* The Phœnix Assurance Company, of London, *et als.* Order sending issues to a jury. Filed April 16th, 1885. Geo. E. Johnson, deputy clerk. Copy. [In pencil:] Fees, $1.50.

59 *Defendants' Exceptions.*

In the Circuit Court of the United States, District of Vermont.
In Equity.

ROBERT FITTON and WIFE
vs.
THE NORTH BRITISH MERCANTILE INS. CO. OF LONDON *et al.*

In the course of the trial of the above cause issues to be tried by a jury were framed, on motion of defendants, as follows:

1st. Did the complainant, Robert Fitton, for himself or for complainant Helen M. Fitton, procure by fraudulent representations or concealments whatever agreement or agreements they entered into with the defendant companies to insure the destroyed property?

2d. Was the property destroyed or procured to be destroyed by the wrongful, wilful, negligent, or unlawful act of the complainants, or either of them, with intent to defraud the defendants?

3d. Was Helen M. Fitton the real owner of the property claimed to have been insured?

The trial of said issues came on at Windsor, at the May term, A. D. 1885. Before the trial proceeded, upon suggestion of the presiding judge [that] if Mrs. Fitton held the legal title she had an insurable interest, the parties acquiescing, the third issue was to be answered in the affirmative by direction of the court, and the trial proceeded on the other two issues. There was evidence on part of the defendants tending to show that Robert Fitton, acting as
60 agent of his wife, the other plaintiff, applied to the defendants' agent in Brattleborough, on the 20th of August, 1883, for insurance on a certain mill, machinery, shafting, and fixtures situated in Cambridgeport, Vermont; that Fitton was not personally known to the agent, and in the interview between them, in answer to the agent's question whether he had had any fires, stated

that he had never had any fire except one in Cavendish, and that building—a mill—was struck by lightning; that he could prove it by the watchman; that he made an application for an insurance of $12,000, with a general plan of the insured property, not addressed to any of the defendant companies, but left with the agents, and accepted by them as an application, which application is refer-ed to and made part of these exceptions; that after this application and the conversation connected with it Mr. Jenne, the agent, wrote and gave to Mr. Fitton an agreement to "bind" the insurance, a copy of which is set forth in the bill, and is refer-ed to; that it was then agreed between Fitton and the agent that Mr. Jenne should visit the mill on the following Saturday, the 25th of August, survey the property, and settle the rate; the evidence relating to the interview of the 20th August was confined to the testimony of Jennie and Robert Fitton, Jennie testifying to the representation as to former fires set forth in these exceptions, and Fitton denying that he said he had never had any other fire than the one alledged to be caused by lightening; that Mr. Jenne did visit the property on August 25th, and looked through the mill and buildings under the guidance of Mr. Fitton; that he left the mill about three o'clock in the afternoon, leaving Mr. Fitton there. Evi-

61 dence also tended to show that the mill was operated by a lessee, one Hubley, of Worcester, who was not personally at Cambridgeport, but had a superintendent named Hutton in charge of the mill; that at about eleven o'clock the evening of the 25th of August the mill was discovered to be on fire, and was consumed with all its contents; that the week preceding the fire was very dry, and that the mill had been run during that week as usual by water, so far as it could be, which water was supplemented by steam; that the water in the pond on the 25th of August was so low that it would not run the wheel, except for a few revolutions; that the mill was supplied with auxiliary steam-power capable of moving all this machinery; that this power would operate the pumps for the extinguishment of fire; that the fire had been drawn from under the boiler at about five o'clock that afternoon before the fire, as the evidence tended to show was the usual custom, and that there was no steam on when the fire broke out; that the fire broke out in the upper picker-room, which was two stories above the boiler-room, and at the time it broke out there was no fire in the boiler-room; that before and at the time of the fire the water in the flume was so low that the point where the pumps sucked the water was above or just at the level of the water, and that the pump had failed to work the day before the fire, owing to the extreme drouth and the use of the water. It was also shown that in July, 1873, Robert Fitton became the owner of a mill property in Cavendish, in Vermont, consisting of a mill, boarding-house, store-house, & tenement-houses; that in September, 1875. the mill was burned and said to be struck by lightning; that it was not rebuilt; that Robert Fitton conveyed

62 the property to his wife, Helen M. Fitton, by means of a deed to George S. Hill, his father-in-law, and a deed from Hill to Mrs. Fitton on the 8th day of January, 1876. Fitton testified

in behalf of complainants, without objection, that at the time of the conveyance from him to Hill, and Hill to his wife, his wife had a mortgage of $5,300 on the property, while Mrs. Fitton was the owner of the land, Mr. Fitton taking care of her property at Cavendish; the store-house connected with the mill, and claimed to be the property of Mr. Hill, was burned; afterwards the mill boarding-house was burned; afterwards six tenement-houses were burned; afterwards two tenement-houses were burned, and one of these eight tenements belonged to Mr. Fitton; that none of the property was rebuilt.

The defendants offered and produced evidence to show that this property at Cavendish was all insured, and that the insurance money was paid on the loss adjusted by Fitton with the companies.

To this the plaintiff objected, and the court declined to admit the evidence.

The defendant called as a witness one Norman H. Farr, who testified that some time previous to June, 1883, but could not give the date, Fitton applied to him for insurance on this property.

And at this point the complainants objected, and the defendants then offered to show by him that after the Fittons had bought the premises in Cambridgeport, which was in April, 1882, and shortly before Robert Fitton applied to Sherman & Jenne for the insurance in question, he applied to Mr. Farr, who had been for several years an insurance agent in Bellows Falls, where Fitton was well known, for insurance on the property destroyed on August 25th, 1883; that Farr told Fitton that he could not write any insurance for him on account of his former fires and the difficulty he had had with the insurance companies.

To this evidence the plaintiff objected, and the court sustained the objection, and the defendant excepted.

63 The defendants also offered to show that after the fire in question occurred and the claim was made upon the insurance companies, and after the right of the plaintiff to recover for this loss was disputed by the companies on the ground of fraud in procuring the agreement for insurance or in burning the building, and after the evidence *in perpetuam* had been taken by the plaintiff in anticipation of the suit, and before this suit was brought, the agents, Sherman & Jenne, received certain letters signed "John C. Corn," and answered two of them, copies of which letters and answers are hereto annexed, the letters being marked A, B, C, D, and the answers thereto A*a*, B*b*, and made a part of these exceptions. It was claimed that said letters were in a disguised handwriting, and that the signature was a fictitious one; that they were decoy letters, intended to procure an offer of money from the agents, Sherman & Jenne, or from the defendant companies, with a view to use it against them in whatever litigation might take place; that they were written or caused to be written by Robert Fitton, and they offered to prove that in fact Fitton received the answers written by Sherman & Jenne.

To this evidence the plaintiff objected, and the court sustained the objection, and the defendant excepted.

At the trial the defendant claimed and the court ruled that the

defendants, having the affirmative of the issues tried, were entitled to the opening and close. At the conclusion of the defendant's evidence the court stated that they did not consider that the evidence required the complainants to meet it by counter-proofs in relation to any of the issues except the first; and at the close of the evidence the plaintiff asked the court to rule that there was not sufficient evidence to justify the jury in finding that the fire occurred by the act or the employment of the plaintiff, or either of them. Defendant's counsel said that without the evidence that had been excluded he
64 could not claim a verdict on this issue. The issue was therefore withdrawn from the jury. Upon the conclusion of all the evidence the court ruled that upon the defendant's evidence there was nothing to submit to the jury upon the first issue except the questions which were submitted, and to which the jury returned a negative answer; and the questions finally sent to the jury, and the answers they returned, are as follows:

"Did Robert Fitton, at the time of applying for insurance, falsely represent to the agents of the defendants that he had only had one fire?"

Answer. No.

"Did he so represent intending to deceive them or defraud the defendants?"

Answer. No.

And that there was no other misrepresentation or concealments.

And they further answer the second question submitted in the negative, and the third in the affirmative under the directions of the court.

They were directed by the court how to answer those questions not relating to the representations alleged to have been made by Fitton to Jenne.

The finding of the jury upon the questions of fact were then ordered by the court to be filed in the equity side of the cause; and the defendants, being aggrieved by the refusal to admit the testimony offered, except thereto, and pray that their exceptions may be allowed and certified.

MARTIN & EDDY,
Solicitors for Def'ts.

Exceptions allowed and ordered to be placed on file.

HOYT H. WHEELER.

65 "A."

SAXTONS RIVER, *November* —, 1883.

Mr. Jennie and Sherman.

DEAR SIR: I heurd you are looking up the fire at Cambridgeport i think i have a clew that will show how it was done the Sat. night it was burned i came Athens about 1 o'clock when near the village a man drove up into some brush near the road and hitched the horse i thinking strange drove along fastened my team and walked back and found the man was going in the lots towards the village i went

and at the horse I looked, and see the whip was a man's name on it i didn't know there was any trouble about the fire til now i thought the man was after poultry if i can give you the man's name on the whip and help you what will you give me and will you agree not to expouse me til it comes to cort. If i see the man i could tell him. write soon to Bellows Falls as i am there most every day i don't want to give you my wright name til you write me what you will give me.

JOHN C. CORN.

66 "A*a*."

BRATTLEBRO', VT., *Nov.* 24, 1883.

Mr. Corn.

DEAR SIR: Your favor received, and in reply would say that we are anxious to ascertain who, if any one, set the Fitton mill on fire, and that if we could obtain information that would lead to the detection & conviction of the person who set the fire we should be willing to pay well for it. You claim to have such knowledge. We should like to meet you and talk it up.

If you will appoint time and place to meet you at Bellows Falls we will meet you.

(Signed) SHERMAN & JENNE.

67 "B."

SAXTONS RIVER, *Nov.* —, 1883.

Mr. Sherman & Jennie.

DEAR SIR: i got yours of 24, did not go to Falls as soone as i thought or would have got it sooner, i am sure i am wright i had a party point Ruben Fitton out to me at Falls day i got yours he is not the one i saw in the wagon i am shure i dont want get mixed up i have taken advice and was told not to call at post office for yours as i might be known and you would make a witness out of me and so i would not get anything of you, my friend said he knew Fitton would pay me well to keep dark if i can put you on the right track and you find it all right and it was him will you give me a writing that you will pay me $500. cant see what man was up to if not for that or poltry. Answer to Bellows Falls.

JOHN C. CORN.

68 "B*b*."

BRATT', VT., *Dec.* 4, 1883.

John C. Corn.

DEAR SIR: Your favor of recent date, in answer to ours of the 24th ult., is rec'd. In reply would say that we do not blame you in the least for not giving away your information. We are satisfied from the tone of your letter that you have got hold of the right man and we are willing to pay you well for it. $500 is a good deal of money, but we will tell you what we will do. If you will tell us who the man is who you saw and give us such other information as

shall lead to his detection and conviction, we will give you $250, and we have not the slightest doubt but what Robert Fitton would pay the other $250, as he is, doubtless, very anxious to know who set the fire, and it would help him to get his insurance at once. Some think the fire came so soon after the mill was surveyed that he had some knowledge of the origin of the fire. What do you say; will you take the $250 with the prospect of getting $250 more? Answer soon.

Your truly, SHERMAN & JENNE.

P. S.—Do you want the money before court?

69 "C."

Mr. Sherman and Jennie.

DEAR SIR: It seems to me you are trying to get me to tell you and then i can only get what you have a mind to give me, i cant see why Fitton would pay me if he had it had i shall try to see him before i do anything with you and see what he will say and then write you i will not tell him i wrote you i have got through where i was and gone to Bellows Falls.

JOHN C. CORN.

70 "D."

BELLOWS FALLS, *Dec.* 14, 1883.

Mr. Sherman and Jenne.

DEAR SIR: i saw Mr. Fitton i told him i wished to talk with him about his mill that burned he asked me my name and where i lived and if i was employed by anv one to see him i told him who i was and where i lived he then asked me what i wanted he said he had nothing to say the cort would say all that was necessary, said his wife would sue month he said the insurance lawyers abused him that Mr. Jennie was the only deacent one in the crowd that he liked him and would do the right thing if he had his way he said he acted fair and that a man at the had slandered him and was going to sue him when he caught him down to Boston he then said if i had any business he would have a witness and answer any questions he considered right i then told him what i had seene he said he knew that and all about it a few days after the fire and that the insurance company had benn so mean he would not have anything to do with them and he said that when over to see the fire he was told that a teame had been hitched near the road and was to drive fast as it could go away from the village a few minutes before the fire was discovered he said a Dr. in the village told him and a man by the name Will Bur knew about the horse hitched Fitton said he heard the next day at Bellows Falls after he went to see about the fire that a man from N. H. whom he had had some trouble with was there sat night the mill burned with a teame and that he had threatened him he would be even with him and that he thinks he thought it was not
71 insured as he told him when he traded with him and took several hundred dollars out of him that he wanted insured

and that he followed and tracked him to a place where he stopped the rest of the night and the next night he drove home he said he had seene the man and that he accused him of it and told him all the particulars and after time the man see he was caught and admitted it and that he had in writing all about it he said the man had paid him some money and he had got his note due soon for more after he had beat the insurance company the man would pay smart for it or get arrested I gave him the name on the whip he said that want his name he said they had another company write a policy on it besides you and should make them pay too after he beat you he said other things but I cant remember all have wrote you as near as I could it is certain I cant get money out of him he seems like a sharp man and he says the insurance company can go to the devil for all of him he says he will find out and let me know about the name on the whip

JOHN C. CORN.

Mr. Fitton said he was going away next month to be gone a year he also told me if it had not been for a girl who went to camp meeting he would not have had you done it elsewhere that the girl told him that the mill had been on fire a few days before so he stopped and and see you about insuring it.

72 CLERK'S OFFICE, U. S. CIRCUIT COURT,
DISTRICT OF VERMONT, BURLINGTON, *February 13th*, 1886.

I hereby certify that the above and foregoing is a true copy of the original exceptions of defendants in case of Robert Fitton and Wife *vs.* The North British Mercantile Insurance Company of London *et als.* now remaining on file in this office.

[Seal Circuit Court, Vermont District, U. S. A.]

GEO. E. JOHNSON, *Clerk.*

Grace L. Cutler, 64 Sears Building, Boston.

73 [Endorsed:] Exhibit "F." Robert Fitton & Wife *vs.* The North British & Mercantile Ins. Co. & *als.* Defendants' exceptions on trial of issues to jury. Filed in court July 8th, 1885. Geo. E. Johnson, deputy clerk. Copy.

74 Circuit Court of the United States, District of Vermont. May Term, 1885.

ROBERT FITTON & WIFE
vs.
NORTH BRITISH MERCANTILE INSURANCE COMPANY OF LONDON & Others.

In this cause the jurors upon their oaths say, in answer to the first question submitted for determination, as directed by the court, as follows:

Did Robert Fitton, at the time of applying for insurance, falsely

represent to the agents of the defendants that he had only had one fire?

Answer. No.

Did he so represent intending to deceive them, or defraud the defendants?

Answer. No.

Was the representation relied upon by the agents in effecting the agreement of insurance?

Answer. No.

75 And that there was no other misrepresentations or concealments.

And they further answer the second question submitted in the negative, and the third in the affirmative under the directions of the court.

ASA ROLLINS, *Foreman.*
CHAS. H. CADY.
JOSEPHUS STREETER.
CHAS. W. JONES.
A. J. HUNTER.
JOHN A. SAVAGE.
LEVI K. WHITE.
MILES SMITH.
SAMUEL BROWN.
L. B. CABOT.
V. C. HODGMAN.
C. O. UPSTON.

CLERK'S OFFICE, U. S. CIRCUIT COURT,
DISTRICT OF VERMONT, BURLINGTON, *June* 25, 1885.

I hereby certify that the above and foregoing is a true copy of the original now on file in this office.

[Seal Circuit Court, Vermont District, U. S. A.]

GEO. E. JOHNSON,
Deputy Clerk.

76 [Endorsed:] United States circuit court, district of Vermont. Exhibit "G." Robert Fitton & Wife *vs.* Phœnix Assurance Co., of London, *et als.* Verdict. Filed May 22, 1885. Geo. E. Johnson, deputy clerk. Copy.

77 Circuit Court of the United States, district of Vermont. October T., 1884. In Equity.

ROBERT FITTON and WIFE *vs.* PHŒNIX ASSURANCE CO. *et al.*

This cause has been heard before on demurrer to the bill which was overruled as to the defendants now before the court, with leave to answer over. Fitton & Wife *vs.* Fire Insurance Ass'n, 20 Fed. Rep., 766. The defendants have answered that the agreement to bind insurance was procured by fraudulent representations of the orators as to the situation of the property, as to exposure to and precautions against loss from fire; that the loss occurred through

want of the precautions represented to be employed, and the wrongful, willful, and negligent acts of the orators. Issues of fact are raised by the traverse of the answers, and the defendants now move that these issues be sent to a jury. The motion is opposed upon the ground that by the statutes of the United States the power to send issues of fact to a jury is not given to but rather taken
78 from the circuit courts as courts of equity, and that these issues should be tried by the court and not sent to a jury if the power to send them exists. The provision of the statute chiefly relied upon to show want of such power is that found in sec. 648 providing that "the trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction." It is argued that the exception excludes that mode of trial in the excepted cases. But that is not understood to be the meaning of the provision. The object of it seems to have been to carry out the constitutional provision guaranteeing the right to trial by jury in common-law cases, and at the same time not to require a trial in that mode in equity and admiralty cases. This provision was enacted in early times, and the power of a circuit court under it to send issues to a jury has always been recognized. Field *vs.* Holland, 6 Cranch, 8; Harding *vs.* Handy, 11 Wheat., 103; Brockett *vs.* Brockett, 3 How., 691. It is expressly stated to exist in
79 Garsed *vs.* Beall, 92 U. S., 684. The motion cannot be denied upon that ground. The inconvenience of so sending the issues has been dwelt upon in the argument; but as the trial must be in the same court, with the difference only that it is upon the law side by jury, according to the course of the trial of common-law cases, instead of on the equity side by the judges, according to the ordinary course of equity procedure, that consideration is entitled to but little weight. The principal question is as to the propriety of so sending the issues in this particular case. The issues are the same that they would have been if an insurance in fact by delivery of a policy, instead of a mere agreement to insure, had been effected. The orators have standing in this court merely on account of that difference. The right to trial by jury of an issue of fact proper for their cognizance is valuable, as it exists and is guaranteed by the const-utions and laws of this country, notwithstanding the hostility shown to it in some quarters. The defendants have not an absolute right to that mode of trial in this case because it
80 is not within the constitutional or statutory provisions, but they have the right to have their request for it carefully considered when it falls so naturally in the line of the right in other cases. These issues seem to be very proper for the cognizance of a jury in this case.

Motion granted.

HOYT H. WHEELER.

JAMES L. MARTIN,
For Defendants.
MARTIN H. GODDARD,
For Orators.

CLERK'S OFFICE, U. S. CIRCUIT COURT,
DISTRICT OF VERMONT, BURLINGTON, *Feb'y 11th*, 1885.

I hereby certify that the above and foregoing is a true copy of the original now on file in this office.

[Seal Circuit Court, Vermont District, U. S. A.]

GEO. E. JOHNSON,
Deputy Clerk.

81 [Endorsed:] Exhibit "K." United States circuit court, district of Vermont. Robert Fitton & Wife *vs.* Phœnix Assurance Company *et als.* Decision. Filed February 10th, 1885. Geo. E. Johnson, deputy clerk. Copy.

82 Circuit Court of the United States, District of Vermont. In Equity. October Term, 1885.

ROBERT FITTON & WIFE *vs.* PHŒNIX ASSURANCE CO. *et al.*

The issues of fact which were sent to a jury in this case (23 Fed. Rep., 3) have been tried, and, by verdict, found for the plaintiffs. A question was raised as to the value of the property destroyed by fire. This question was, by agreement, referred to a master, who has reported the value to have been $14,333.00. No exceptions have been filed to that report. The sum for which insurance was agreed was $12,000.00. Therefore there is no question but that there should be a decree for the full amount agreed for. The only remaining question is whether there shall be a decree against all the companies for the whole or against each for its proportion. This question was left open when the demurrer of these defendants was overruled. (20 Fed. Rep., 766.) This is not an agreement of insurance as such agreements are set forth and
83 expressed in policies of insurance duly executed by the insurers, but is an agreement for insurance signed by agents of the respective companies as such agents, to be so set forth in a policy or policies to be thereafter executed. One ground of the jurisdiction of the court as a court of equity is that there might be a decree for specific performance of the agreement by actual execution and delivery of the policies according to the terms of the agreement. Then full relief would be given, as is usual in equity cases, by further decree for the payment of the loss according to the terms of the policies. Taylor *vs.* Merchants' Ins. Co., 9 How., 390; Wood on Fire Ins., 29, 32. In form the decree for the execution and delivery of the policies is frequently omitted, and a decree for the payment of the loss only is made, where there has been a loss, but the grounds for the decree remain the same. So the real question here now is as to what policies would be required to carry out the agreement made by the agents with the plaintiffs—whether there should
84 be one policy for the whole amount duly executed and delivered by all the companies jointly or a separate policy executed and delivered by each for its share of the risk. The terms of the agreement are in the writing, but those terms are to be applied,

as those of all written agreements are, to the subjects to which they relate. The writing is:

"To Mrs. Helen M. Fitton.

"DEAR MADAM: We hereby agree to bind from date twelve thousand dollars of insurance on woolen mill and machinery at Cambridgeport, as per survey on file at our office, in the North British and Mercantile, Commercial Union, Guardian, and Phœnix, of London, insurances companies, at three per cent."

These companies are not shown to have, nor understood to have, any business relations with each other further than that each insures property against loss by fire.

The agents who signed the writing are not shown nor understood to be agents of the companies jointly to act for all, but are understood to be the agents of each to act for it in effecting insurance.

85 Their acts should be construed in accordance with their authority. The words of and in are understood to be used as distributives of the $12,000.00. They agree to find that sum, in all, among the companies. Separate policies for one-fifth of the risk each in each of these four and in another company were written by the agents upon the blanks of the respective companies furnished to the agents before the agents knew of the loss. The plaintiffs demanded these policies, which were refused. The plaintiffs were not entitled to the policy of the other company, because it had never been contracted for. Hence the demurrer to the plaintiffs' bill by that company was sustained. 20 Fed. Rep., 776. This construction of the written agreement by the parties excludes any understanding that there was to be a joint policy for the whole. The whole case goes to show that the understanding was that separate policies to the amount of twelve thousand dollars in all in the respective companies were to be made out and delivered by the agents. They had no blank policies executed by all the companies jointly,

86 and would doubtless have been as much surprised if the plaintiffs had requested as the companies would if the agents had asked of them such policies.

The effect of the decision of this question upon the right to appeal has been urged, but that has no present bearing. It is the duty of this court to make such decree upon the case as made as appears to be lawful and just; whether any appeal lies from such decree when made is to be determined by the law applicable to that subject.

The risk was to be divided among the defendant companies. The presumption is that it was to be divided equally, as nothing to the contrary is shown.

The defendants appear to have denied the plaintiffs' rights to policies and to payment of loss August 29th, 1883, and did not permit them to make proof of loss under the policies, if such were required. The plaintiffs' rights appear to have accrued upon that refusal, and interest is to be computed from that time.

87 Let a decree for the orators be entered for the payment by the defendants, each respectively, to the oratrix of three thou-

sand dollars, with interest and one-fourth of the costs of the suit, within thirty days from the entry of the decree.

HOYT H. WHEELER.

MARTIN H. GODDARD,
For Orators.
W. S. B. HOPKINS,
MARTIN & EDDY,
For Defendants.

CLERK'S OFFICE, U. S. CIRCUIT COURT,
DISTRICT OF VERMONT, BURLINGTON, *Dec'r* 31*st*, 1885.

I hereby certify that the above and foregoing is a true copy of the original opinion now on file in this office.

[Seal Circuit Court, Vermont District, U. S. A.]

GEO. E. JOHNSON, *Clerk.*

88 [Endorsed:] Exhibit "L." United States circuit court, district of Vermont. Robert Fitton & Wife *vs.* Phœnix Assurance Company *et al.* Opinion. Wheeler, J. Filed December 27, 1885. Geo. E. Johnson, clerk. Copy. [In pencil:] Fee, $1.50.

89 In Circuit Court of the United States, District of Vermont.
October Term, 1885. In Equity.

ROB'T FITTON & WIFE
vs.
THE PHŒNIX ASSURANCE COMPANY, of London, England; THE Guardian Fire & Life Assurance Company, of London, England; The North British & Mercantile Insurance Company, of London, England, and Edinburgh, Scotland, and The Commercial Union Assurance Company, of London, England.

Present: Hoyt H. Wheeler, judge.

This cause came on to be further heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that each of said defendants pay to said orators the sum of three thousand dollars, with interest thereon from the 29th day of August, A. D. 1883, amounting to the
90 sum of three thousand four hundred and thirty-three dollars and fifty cents; that each of said defendants pay to said orators one-fourth of the orators' costs in and about this suit, said one-fourth being taxed and allowed at the sum of one hundred and seven dollars and sixty-one cents, said sum due in equity and said costs amounting to the sum of three thousand five hundred and forty-one dollars and eleven cents, and which said sum, it is ordered, adjudged, and decreed, shall be paid to said orators within thirty days from the 26th day of January, A. D. 1886, with interest from the last-named date to the time of payment, and thereof the said orators may have execution at the expiration of said thirty days against each of said defendants.

Done in court in said term this 26th day of January, A. D. 1886.
HOYT H. WHEELER.

[On the margin:]
$3,433 50
107 61
$3,541 11

91 I certify that this decree corresponds to the orders and rules of court in this cause.
MARTIN H. GODDARD, *Solicitor.*

CLERK'S OFFICE, U. S. CIRCUIT COURT,
DISTRICT OF VERMONT.

I hereby certify that the above and foregoing is a true copy of the original now on file in this office.
GEO. E. JOHNSON, *Clerk.*

92 [Endorsed:] Exhibit "M." Rob't Fitton & Wife *vs.* Phœnix Assurance Company *et als.* United States cir. c't, dist. of Vermont. In equity. Decree for orators. Filed January 26th, 1886. Geo. E. Johnson, clerk. Copy.

93 Circuit Court of the United States, District of Vermont. Oct. Term, A. D. 1885. In Equity.

ROBERT FITTON and WIFE
vs.
THE PHŒNIX ASSURANCE CO., of London, Eng., *et als.*

And now comes the defendants in the above-entitled cause, and moves the court that an appeal be allowed and execution stayed that the cause may pass to the Supreme Court, and offers to give a bond as required by law in such cases, and moves the court to fix the amount therefor.
By MARTIN & EDDY,
Att'ys for Def'ts.

CLERK'S OFFICE, U. S. CIRCUIT COURT,
DISTRICT OF VERMONT.

I hereby certify that the above is a true copy of the original motion now remaining on file in this office.
[Seal Circuit Court, Vermont District, U. S. A.]
GEO. E. JOHNSON, *Clerk.*

94 [Endorsed:] Exhibit "N." Robert Fitton & Wife *vs.* Phœnix Assurance Co., London, Eng. Motion for appeal, &c., by def'ts. Appeal disallowed in open court solely upon the ground that in the opinion of the court the cause is not appealable. Hoyt H. Wheeler. Filed January 26th, 1886. Geo. E. Johnson, clerk. Copy.

[Endorsed:] Exhibit "I." United States Circuit Court, District of Vermont. Robert Fitton & Wife *vs.* Fire Insurance Association *et als.* Decision. Filed July 10, 1884. Geo. E. Johnson, deputy clerk. Copy.

Circuit Court of United States, District of Vermont. In Equity. May Term, 1884.

ROBERT FITTON & WIFE *vs.* FIRE INSURANCE ASSOCIATION, PHŒNIX ASSURANCE COMPANY, GUARDIAN FIRE & LIFE ASSURANCE COMPANY, NORTH BRITISH & MERCANTILE INSURANCE COMPANY and UNION ASSURANCE COMPANY.

From the allegations in the bill, which on these demurrers are to be taken as true, it appears that the duly authorized agents of all the defendants agreed to bind from August 20, 1883, twelve thousand dollars of insurance against loss by fire in the latter four of the defendant Companies, at 3 per cent. on the property of the oratrix, and sent her a writing to that effect, without specifying anything about distribution of the risk among these Companies.

After a loss of the property the agents wrote policies in each of the defendant companies dividing the amount into five equal parts among them, but after learning of the loss refused to deliver any of them, and all the defendants refuse to pay the loss.

On these facts the oratrix has not any claim either at law or in equity against the first defendant. The agents never entered into any preliminary contract to insure the oratrix in behalf of that company. If no companies had been named in the agreement with the oratrix, she probably might have held those which the agents intended to act for in that transaction, and the writing of the policies afterwards would be evidence of intention. But here the companies bound are expressly named; and the contract of the oratrix was expressly with them, without leaving any room for implying any contract between her and other companies out of any intention or understanding of the agents, not known to or relied upon by her. And that company did not insure her, for the policy was not delivered to her, nor known of by her until after the loss. She was not bound to receive it, and neither the agents or the company stood under any obligations to deliver it. Without delivery it was the act of but one party to it, which amounted to no contract at all as between the two, even if with delivery it would have been good after a loss not known at the time, without any contract providing for it previous to the loss.

The contract with the other companies was an argreement to insure, not a contract of insurance.

The agreement to pay the premium at the rate specified was a sufficient consideration to make the agreement a binding contract. Generally whatever is agreed to be done, is, in equity, considered as done. The agreement to insure may in equity be treated as insurance. At law there could only be an action for the breach of the contract to effect the insurance. This might not be so full and complete a remedy as that which can be afforded in equity. The right to proceed in equity is well settled, in such cases, in the courts of the United States, notwithstanding the statute establishing the boundaries of

equity jurisdiction, which has been in force from the beginning. Rev. Stat. U. S., Sec. 723 Taylor *vs.* Merchants Ins. Co., 9 How, 390; Commercial Ins. Co. *vs.* Union Ins. Co., 19 How, 321. The jurisdiction depends upon the nature of the contract, and not, as has been argued, upon the difficulty or nature of the proof.

In this case the evidence is, apparently, in writing and easy of production, while in some cases it has been in correspondence and oral communications, not so readily at hand for the purpose. But when the contract is made out, in any mode, to be a preliminary contract for insurance, instead of a completed contract of insurance, the remedies upon it are the same, and may be enforced in the same way. The right to proceed in equity in this case cannot be denied without disregarding these decisions of the highest court.

The contract is an entire one with the authorized agents of all the companies. The meaning of it may turn out to be that each should insure for one-fourth; or that, as to the oratrix, all were bound *in solido* to the effecting of the insurance; or some other construction may prevail; but whatever may be the ultimate result, all those defendants are liable upon it to the oratrix, and have a common interest in regard to it as between themselves, and all appear to be proper parties to this suit to enforce.

The demurrer is sustained, and the bill adjudged insufficient as to the Fire Insurance Association; and the demurrers are overruled as to the other defendants, with leave to answer over by the 16th day of August.

HOYT H. WHEELER.

MARTIN H. GODDARD,
For Orators.

ALDUCE F. WALKER,

For Fire Insurance Association.

W. S. B. HOPKINS,
For other Defendants.

CLERK'S OEFICE, U. S. CIRCUIT COURT,
DISTRICT OF VERMONT.

I hereby certify that the above and foregoing is a true copy of the original, now on file in this office.

GEO. E. JOHNSON,
Deputy Clerk.

(Seal of the U. S. Circuit Court, Vermont District.)

117-367

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 7, Original.

EX PARTE: IN THE MATTER OF THE PHŒNIX INSURANCE COMPANY OF LONDON, ENGLAND, AND OTHERS.

PETITIONERS.

ON PETITION FOR A WRIT OF MANDAMUS—RETURN TO RULE TO SHOW CAUSE.

Now at this day comes Hoyt H. Wheeler, a judge of the Circuit Court of the United States, District of Vermont, and, as such, respondent in the above-entitled matter, and shows cause why a writ of mandamus should not issue as prayed for in the petition herein, as follows: The facts set forth in said petition and the copies of the various papers and records annexed to said petition, relating to said cause of Robert Fitton and Helen M. Fitton against the Phœnix Insurance Company of London, England, and others, which was commenced by a bill of complaint filed in the United States Circuit Court, District of Vermont, February 21st, 1884, as set forth in said petition and accompanying papers, are substantially true, excepting the statement in said petition, on page 2, that an appeal was entered from the decision of the court overruling the demurrer of these petitioners; which said statement that an appeal was entered from the decision of the court overruling the demurrer, if in any wise material, is not true. But, on the contrary thereof, no appeal was entered or taken from the decision of the Circuit Court overruling said demurrer.

And further, excepting the statement therein on page 3 thereof, that said cause, on the 7th day of July, 1885, was sent to a master to assess damages, which said statement, if in any manner material,

is not true as made, but by consent and agreement of the parties said cause was sent to a master specially appointed for this purpose to ascertain and report to the court the value of the property insured that had been destroyed by fire which occasioned the loss in question, who found and reported the value thereof to be fourteen thousand three hundred and thirty-three dollars.

And this respondent further states that the exceptions taken and allowed upon the trial by jury have not in any manner been further brought before the Circuit Court upon the equity side thereof by the petitioners herein or otherwise. And now the respondent respectfully submits the premises considered that upon all the facts neither the said petitioners have nor either of them have any legal right of appeal from the said decree of the Circuit Court of the United States for the district of Vermont to the Supreme Court of the United States, and prays to be hence dismissed.

HOYT H. WHEELER,
Judge of the Circuit Court of the United States,
District of Vermont.

MARTIN H. GODDARD,
Counsel for Respondent.

I, Hoyt H. Wheeler, being first duly sworn, do depose and say that the foregoing answer is true, as I verily believe.

HOYT H. WHEELER.

Subscribed and sworn to before me the 18th day of March, 1886.

[SEAL.] TIMOTHY GRIFFITH,
Clerk United States Circuit Court
Southern District of New York.

Office Supreme Court U. S.
FILED.
MAR 22 1886
JAMES H. McKENNEY.
CLERK.

117-867

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1885.

No. 7 Original.

EX PARTE:—IN THE MATTER OF THE PHŒNIX INSURANCE COMPANY OF LONDON, ENGLAND, AND OTHERS, PETITIONERS.

PETITION FOR A WRIT OF MANDAMUS.

PETITIONER'S BRIEF

On rule to show cause, returnable March 22, 1886.

W. S. B. HOPKINS,

For Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 7 original.

EX PARTE:—IN THE MATTER OF THE PHŒNIX INSURANCE COMPANY OF LONDON & ALI.

PETITION FOR MANDAMUS.

PETITIONERS' BRIEF.

Statement of the Case.

This is a petition for a writ of *mandamus* to direct the Judges of the Circuit Court for the District of Vermont to allow an appeal by these petitioners, who were respondents in an Equity suit in said Circuit Court brought by Robert Fitton and wife, from the final decree of said Circuit Court in said cause, which appeal was disallowed solely on the ground that said cause was not, in the opinion of that Court, appealable.

The Case Below.

The plaintiffs in the cause in the Circuit Court sought recovery on an insurance contract against these four petitioners; and in the same bill, joined as a defendant the Fire Insurance Association (limited) of London. *(Record p. 6.)*

They alleged *(Record p. 8)* the execution of a written contract by these petitioners, acting by their agents, duly authorized, with the female plaintiff which is printed below; also *(Record p. 9)* the execution of *five* policies of insurance on the female plaintiff's property mentioned in said contract, made Aug. 27, 1883, one each in the petitioning companies and said Fire Insurance Association equal in amount and amounting in all to the same sum named in said contract, to wit $12,000; also a loss by fire *(Record p. 8)* exceeding pecuniarily the said

sum and happening Aug. 25, 1883; also *(Record p. 9)* a subsequent demand for and refusal to deliver said five policies; and they also made the necessary allegations as to title in the plaintiffs, incorporation of the defendants and their foreign citizenship and lawful pursuit of their business in Vermont. *(Record pp. 6, 7.)*

The plaintiffs prayed (1) discovery of these *five* alleged policies and that they be decreed to be issued to them; (2) a decree that $12,000 be paid to the plaintiff Helen M. Fitton by the five defendants, so insured by said *five* policies and that said five defendants contribute thereto in the same proportion as they assumed the risk by the said contract and policies; (3) and for general relief.

The fifth Company (The Fire Ins. Asso.) demurred to the bill *(Record pp. 12, 13)* and its demurrer was sustained, and from that time it ceased to be a party, and nothing has been since heard of the *five* alleged policies. The suit stood thenceforth solely on the following contract or memorandum, which is the contract on which the bill was brought as above stated:—

"Brattleboro, Vt., Aug. 20, 1883.

Mrs. Helen M. Fitton, Proctorsville, Vt.:

Dear Madam—We hereby agree to bind from date twelve thousand dollars of insurance on Woolen Mills and machinery at Cambridgeport as per survey on file at our office, in the North British and Mercantile, Commercial Union, Guardian, and Phœnix of London Insurance Companies, at three per cent.

Sherman & Jenne, Agents."

These petitioners — defendants below — jointly demurred *(Record p. 11)* to the bill as against them, and their demurrer being over-ruled, appealed from that judgment and answered over. In their answers they averred that the memorandum was obtained from their agents by fraudulent representations and concealments, and that the loss also occurred through the fraudulent acts of the plaintiffs. *(Record pp. 16, 17, 8th and 9th paragraphs of answer.)*

The opinion of the Court over-ruling the demurrer of these petitioners and sustaining that of the other defendants is printed. *(Record opposite p. 26.)*

The trial of issues to a jury on these defenses *(Record p. 18)* resulted in a verdict favorable to the plaintiffs (*Record pp. 25,*

26), and in its course the defendants took exceptions to the rulings of the Court, which are a part of the records on which the appeal was claimed. *(Record p. 19 et seq.)*

After the verdict a master assessed the amount of loss to be greater than the amount of $12,000, the amount named in the contract, and no exceptions were taken to his report.

On motion by the plaintiffs the final decree, from which petitioners claim an appeal, was taken, and the Court decreed *(Record p. 30)* the recovery of the whole $12,000 by the plaintiffs, but in making such decree divides the amount among the four defendants, giving judgment of about $3500 against each respectively, and bases its action in this regard upon the construction of the aforesaid memorandum contract. *(For opinion see Record p. 28.)*

Specifications of Grounds for Relief.

The petitioners claim that they had a right to appeal on the ground that the matter in dispute exceeded $5,000 in value, and the Court below ruled the contrary and denied the appeal as matter of law. The plaintiffs' claim includes—

(a) The contract is a joint contract, and the decree is not appropriate therefore to the allegations of the bill.

(b) If not joint, still the contract is a *single* contract with two contracting parties.

(c) The demurrer goes to the whole remedy on the said single contract involving over $5,000.

(d) The issue of fact tried to the jury, the exceptions on which trial petitioners urge for hearing, went to the fraudulent procuring of the whole insurance, that is the very contract; and the fraudulent burning of the property while the contract subsisted and there were no policies—that is the whole loss.

Points in Argument.

I.

As the appeal was refused on the ground that the cause is not appealable, and this Court is not asked to review any exercise of discretion or judgment on fact by the Court below, the application is the proper and only remedy for the petitioners.

Ex parte, Cutting, 94 U. S., 14.
Ex parte, Jordan, 94 U. S., 248.

II.

The Contract.

1 The contract written and signed by the agents, as printed above, is a joint agreement of temporary insurance for a wholly indefinite time, presumably given to cover the property until the agents should definitely place the sum insured for the insurer in the form of policies, which would contain the distinct terms of the insurance and subdivide the risk, which till then was left as one.

The bill in equity shows that the agents considered themselves authorized when they wrote policies to introduce other acceptable parties as insurers in part, and that the insured deemed such introduction, if made, to be in pursuance of the contract. The bill states *(Record p. 9, at top of page)*, "the said Sherman & Jenne, as agents as aforesaid, and *in pursuance of the terms of said contract*, made out formal and complete policies of insurance to said Helen M. Fitton, upon said property," in *five* companies instead of four. The bill further states in the next clause that the insured tendered "the premium upon *said policies* and for said insurance and demanded polices according to said written memorandum, and demanded *the polices written as aforesaid;* that said Sherman & Jenne refused to accept said premium and refused to deliver *said policies* or to otherwise carry out said contract."

The conduct of the parties in this regard is not a variance of or contradictory to the contract, but shows their construction to have been that the contract was not, as the Circuit Court in its opinion *(Record opposite page 26,)* held, an "agreement to insure" by subsequently writing four policies, equal in amount, in the four companies named, but a temporary insurance by the four companies jointly for the few days to intervene before inspection of the premises and the final settling of the insurance. The bill shows in paragraph 4 *(Record p. 8)*, that one of the agents agreed to visit the premises on Aug. 25th and that "policies would then be written dated the 20th day of August," which is the date of the contract.

Suppose in this very case, no policies being written and while the contract was therefore still in force, that one of these four companies had become bankrupt, could the other three have

said, in our contract our agreements are several and we are only held for $3,000 each or $9,000 in all?

2 But further, if the contract was not a joint one it was at least a *single contract*, four persons constituting one of the parties. It was not four agreements made by a common agent and put in one writing. A Court of Equity could surely not acquire any jurisdiction if it were, any more than on four promissory notes made by four promissors and payable to one person, or made by one person and payable to four payees. In the opinion of the Circuit Court on the demurrers (record opposite p. 26, last clause but one) the Court supported its jurisdiction in this language:

"The contract is an entire one with the authorized agents of all the companies. The meaning of it may turn out to be that each should insure for one-fourth; or that, as to the oratrix, all were bound *in solido* to the effecting of the insurance; or some other construction may prevail; but what whatever may be the ultimate result, all those defendants are liable upon it to the oratrix, and have a common interest in regard to it as between themselves, and all appear to be proper parties to this suit to enforce."

Passing over the question of liability *in solido*, which has been suggested above, this is the very spirit of our contention. On the worst construction for these petitioners the contract is *entire*, if it be one with which Equity Courts can deal, and these companies "*have a common interest in regard to it, as between themselves.*" It is *one* transaction, *one* contract, *one* agreement, made by *one* common agent, in which four persons on one side between themselves being of *one mind*, met the mind of the other contracting party.

In the enforcement of this contract there is no question as to recovery against *some and not against all* the insurers, nor since the loss occurred while it was in force, does it matter to Mrs. Fitton in what proportion one or the other shall pay, so that she gets her money.

III.

The Matter in Dispute.

The amount of the matter in dispute as affecting the question of appeal depends on the issues which were tried between the parties.

Here the issues tried were:—

(a) One of law as to remedy, which goes to the whole amount of insurance named in the single and entire contract.

(b) Whether the contract was not wholly void because of the fraud of the insured in obtaining it.

(c) Whether should the contract be found to be untainted with fraud, the whole loss under it was not fraudulent.

See joint demurrer Record p. 11.
See issues to Jury Record pp. 18, 19, and 25, 26.

THE AUTHORITIES.

1. The cases, in which the amount involved in the whole suit has been held not to be the matter in dispute, are those in which parties having *distinct causes of action* growing out of a transaction join or are joined in one suit though separate actions would lie; and where the claim of any one plaintiff may be sustained or defeated on its own merits without affecting those of the others.

(a) As in admiralty practice in libels for seamen's wages and in salvage cases, and by shippers where there is an injury to the goods shipped.

Oliver v. Alexander, 6 Pet., 143.
Spear v. Howe, 11 How., 522.
Rich v. Lambert, 12 How., 347.
Ex parte Balt. & Ohio R. R., 106 U. S., 5.

(b) So also in Equity cases where claims against several parties distinct in their character are joined in one bill.

Paving Co. v. Mulford, 100 U. S., 147.
Farmers L. & T. Co. v. Waterman, 106 U. S., 270.
Adams v. Crittenden, 106 U. S., 577.

(c) So also in Equity suits where several plaintiffs, with distinct causes of action join in one bill.

Seaver v. Bigelow, 5 Wall, 208.
Fourth Nat. Bk. v. Stout, 113 U. S., 684–686.
Freeman v. Dawson, 110 U. S., 264–269.
Stewart v. Dunham, 115 U. S., 61.

The first of these three classes of cases palpably differs from the case at bar.

In the second class the joinder is of defendants as in the case at bar.

But in *Paving Co. vs. Mulford* the company sought to recover from separate defendants certificates or their values, which the defendants by distinct and independent acts had become possessed of, and to which the company claimed title.

In *Farmers Loan & Trust Co. v. Waterman* the question related to the application of a certain portion of a trust fund to the payment of sundry labor and supply claims due to distinct persons on distinct contracts from the Rail Road whose property had been converted into the fund.

In *Adams v. Crittenden* it was sought by the assignee in bankruptcy who sold property by order of the Court and the purchaser thereof to restrain two judgment creditors of the insolvent the judgment of each being entirely independent of the other, from enforcing the judgments against the property sold.

The third class of cases were creditors' bills, where the joinder was therefore a joinder of plaintiffs. Yet as the issues presented questions of fraud on part of the debtor and the defendant they have an analogy to the case at bar. But it is to be observed that creditors' bills, seeking to set aside conveyances by their debtor, are but assertions of distinct claims for the *pro rata* share of each plaintiff; and there is no judgment to set aside the conveyance or to establish a trust in the holder in favor of creditors, except as against each creditor. As to all the rest of the world the conveyance stands or the balance of the fund remains in the holder. This reasoning is supported by the language of the Court, thus: in *Fourth Nat'l Bk. v. Stout*, *supra*, it is said, "the suit was instituted not for the whole property in the hands of the bank, but only for the complainant's *pro rata* share. After the suit was begun the intervening creditors were allowed to come in each for his separate share of the assets. On their intervention the case stood precisely as it would if each creditor had brought a separate suit for his separate share of the fund."

It is difficult to see how the decision in *Stewart v. Dunham* could be justified on another view of the law, leaving, as it does, one, whom this Court held in an appeal as against a large creditor to be innocent of fraud as matter of law on an undisputed transaction, a victim of small creditors in whose favor the lower Court had given a judgment erroneous in law on the same point. In a single and entire contract like the one in the case at bar, this could never be permitted.

2. We claim that the case at bar comes within the principles upon which appeals have been held to lie, where common interests of the several parties on the same side of the cause all wholly grow out of one single contract, or title, or transaction, the validity of which or the remedy on which is the matter in dispute.

Shields v. Thomas, 17 How., 3.
Market Co. v. Hoffman, 101 U. S., 112.
The Connemara, 103 U. S., 754
The Maimie, 105 U. S., 773.
Friend v. Wise, 111 U. S., 797.
Freeman v. Dawson, 110 U. S., 264.

In *Shields v. Thomas*, where representatives of a deceased person claimed against an administrator funds of the estate which he had misappropriated the Court held *(pp. 4 and 5)* that, although the distributive share of each was less than $2,000 (the then jurisdictional sum), the *matter in dispute* was the amount due to the parties "collectively, and not the particular sum to which each was entitled when such amount was distributed among them." The parties "all claimed, under one and the same title, they had a common and undivided interest in the claim, and it was perfectly immaterial to the appellants how it was to be shared among them. If there was any difficulty as to the proportions in which they were to share, the dispute was among themselves."

The discussion of the point in the opinions in the cases of *The Connemarra*, by the learned Chief Justice, and in *Market Co. v. Hoffman* by Mr. Justice Strong, quite support our proposition.

In the case of *Farmers Loan & Trust Co. v. Waterman*, *ubi supra*, the language used is appropriate to the case at bar, as follows: (at p. 270)—

"If the controversy is about a matter in which several parties are interested collectively under a common title, and, in the decree, after establishing a common right—a division is made among the claimants according to their respective interests, this separation of the decree into parts will not prevent an appeal."

"By matter in dispute is meant the subject of litigation—the matter for which suit is brought—and upon which issue is joined, and in relation to which jurors are called and witnesses examined."

Mr. Justice Field in Lee v. Watson, 1 Wall, 337.

The petitioners and the plaintiffs below contested only as to whether twelve thousand dollars of insurance money was due under a single contract for a single loss. They never had but one other dispute and that was whether on the same single contract the remedy sought was a proper remedy and was properly claimed in plaintiff's bill.

The rights, claims, and defences *on both sides of the controversy* all grow out of this one contract. No person's *standing in Court* depends in any part upon any other agreement or right, express or implied.

For the petitioners,

W. S. B. HOPKINS.

117-367

MAR 19 1886
JAMES H. MCKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 7, Original.

EX PARTE: IN THE MATTER OF THE PHŒNIX INSURANCE COMPANY OF LONDON, ENGLAND, AND OTHERS.

PETITION FOR A WRIT OF MANDAMUS.

Brief resisting the Issuing of a Writ of Mandamus asked for by said Petitioners.

MARTIN H. GODDARD,
For Respondents.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 7, Original.

EX PARTE: IN THE MATTER OF THE PHŒNIX INSURANCE COMPANY OF LONDON, ENGLAND, AND OTHERS.

PETITION FOR A WRIT OF MANDAMUS.

BRIEF.

STATEMENT OF THE CASE.

The petitioners in their petition (Record, p 2,) say, "Wherefore "the said Robert and Helen M. Fitton, in their said bill, prayed for "process for discovery for the delivery of the said policies to the said "Helen M., that the defendants in said bill might be decreed to pay "to the said Helen M. the sum of twelve thousand dollars, so insured "on said property, and for other and further relief."

The above statement is a partial but misleading statement of the prayers in the bill of complaint. One would suppose, after reading it, that said prayers asked that all of said defendant insurance companies be compelled to pay twelve thousand dollars in *solido;* when, in fact, the prayer in said bill of complaint, 14th paragraph, (Record, p. 10,) is in the following words:

"And that each of said defendants set forth and discover the said "policies of insurance written by said defendants respectively, and "all correspondence, memoranda, book entries, and papers relating "to the same, and that said defendants produce said original pol- "icies that they may be delivered to said Helen M., and that the "defendants be decreed to pay to the said Helen M. the said sum of "twelve thousand dollars, the sum so by said defendants insured "upon said property by their said concurrent policies, and that they "contribute thereto in the same proportion as they assumed the "same in said contract and policies with interest thereon, and for "such other and further relief in the premises as to justice and "equity shall appertain, and to your Honors shall seem meet."

The great error in said petition (Record, p. 2,) is the following declaration:

"The demurrer of these petitioners was overruled, with leave to "answer over. From this judgment overruling their demurrer these "petitioners entered an appeal, and on the 19th day of August, A. "D. 1884, severally filed the same answer as defendants in the said "equity suit."

No appeal was ever asked for, or taken, from the decision of the circuit court, overruling their demurrer, and no such record can be found, for the simple reason that no such record ever existed.

A very important matter to be considered at this time, as a part of this case, is the fact stated by Judge Wheeler, the respondent, in his answer, viz:

"And this respondent further states that the exceptions taken and "allowed upon the trial by jury have not in any manner been further "brought before the Circuit Court upon the equity side thereof by "the petitioners herein, or otherwise."

II.

THE CONTRACT.

One of the questions in this case is how the written binder (Record, p. 1) shall be construed.

Said binder was the contract between the respective parties. We insist that said binder is to be construed in accordance with common sense and the ordinary methods and ways of doing business.

Woolen mills are insured for one year at anywhere from one and one-half to five per cent., according to the stock used and the exposure.

To assume that the insurance was to be for a few days or for an indefinite time is contrary to common sense. If the insurance was for only a few days, then insurance for one year at the same rate would have cost twelve thousand dollars—the whole amount of the insurance. The last clause in the binder, "at three per cent.," shows the time of said insurance to have been for one year.

None are so ignorant as those who do not wish to understand. The binder could easily be understood by the petitioners if they wished to understand it.

Another question that arises under said binder relates to the amount of insurance that should be placed in each of the respective companies mentioned in the binder.

It is one general rule of all insurance companies that policies shall be written concurrent, and agents are appointed agents of one company at a time and have a right to insure property and write several

policies as agents of each company they represent. Under the ordinary rules and regulations of doing insurance business Messrs. Sherman & Jenne would have a right to have written four separate policies—one in each of the companies mentioned in said binder—for the sum of three thousand dollars each. The case does not show that Sherman & Jenne had any right to write a joint policy in said four companies for twelve thousand dollars, and the case shows that they never attempted to do any such thing.

The opinion of Judge Wheeler states this question as clear and forcibly as it can be stated.

Opinion of Hoyt H. Wheeler (Record, pp. 28, 29 and 30):

"So the real question here now is as to what policies would be required to carry out the agreement made by the agents with the plaintiffs—whether there should be one policy for the whole amount duly executed and delivered by all the companies jointly or a separate policy executed and delivered by each for its share of the risk.

"The terms of the agreement are in the writing, but those terms are to be applied, as those of all written agreements are, to the subjects to which they relate. The writing is:

"'To Mrs. Helen M. Fitton.

"'DEAR MADAM: We hereby agree to bind from date twelve thou-'sand dollars of insurance on woolen mill and machinery at Cam-'bridgeport, as per survey on file at our office, in the North British 'and Mercantile, Commercial Union, Guardian, and Phœnix, of 'London, insurances companies, at three per cent.'

"These companies are not shown to have nor understood to have any business relations with each other further than that each insures property against loss by fire.

"The agents who signed the writing are not shown nor understood to be agents of the companies jointly to act for all, but are understood to be the agents of each to act for it in effecting insurance.

"Their acts should be construed in accordance with their authority. The words *of* and *in* are understood to be used as distributives of the twelve thousand dollars. They agree to bind that sum in all among the companies. Separate policies for one-fifth of the risk each in each of these four and in another company were written by the agents upon the blanks of the respective companies furnished to the agents before the agents knew of the loss. The plaintiffs demanded these policies, which were refused. The plaintiffs were not entitled to the policy of the other company, because it had never been contracted for. Hence the demurrer to the plaintiffs' bill by that company was sustained. 20 Fed. Rep., 776.

"This construction of the written agreement by the parties excludes any understanding that there was to be a joint policy for the whole,

"The whole case goes to show that the understanding was that sep-
"arate policies to the amount of twelve thousand dollars in all in
"the respective companies were to be made out and delivered by the
"agents. They had no blank policies executed by all the companies
"jointly, and would doubtless have been as much surprised if the
"plaintiffs had requested as the companies would if the agents had
"asked of them such policies. The effect of the decision of this
"question upon the right to appeal has been urged, but that has no
"present bearing. It is the duty of this court to make such decree
"upon the case as made as appears to be lawful and just; whether
"any appeal lies from such decree when made is to be determined
"by the law applicable to that subject. The risk was to be divided
"among the defendant companies. The presumption is that it was
"to be divided equally, as nothing to the contrary is shown."

What the agents, Sirs Sherman & Jenne, considered themselves authorized to do is of but little consequence. They had no right to alter or change their contract or binder. The case does not even show why they did so. It may be that they made a mistake, and not having said written binder before them, wrote said twelve thousand dollars in five companies instead of four, thinking that in so doing they were literally carrying out the terms of said binder; but in whatever way the mistake occurred it in no way affects the question of the right of these petitioners to an appeal.

When the bill of complaint (Record, pp. 6, 7, 8, 9 and 10) was drawn the orators had no means of knowing why Messrs. Sherman & Jenne wrote said policies in five companies instead of four, and did not know but what some set of circumstances might be proved which would justify Messrs. Sherman & Jenne in so doing; and therefore the only safe way for the orators at that stage of the pro ceedings was to join the fifth company, the Fire Insurance Association, Limited, but that action on the part of the orators can in no way affect the question now under consideration.

But supposing that some of the companies had failed, even supposing that three of said companies had failed, leaving only one solvent company, and the orators had endeavored to collect the whole twelve thousand dollars of the one solvent company, then the orators would have met the following unanswerable propositions:

First. The agents had no authority to execute a joint contract for the solvent company, binding them jointly with other companies.

Second. That the contract was between the orators and the insurance companies, severally.

Third. That by the ordinary and usual way of doing insurance business, the binder meant that said twelve thousand dollars insurance should be written in four separate and concurrent policies of three thousand dollars each, in each one of said companies.

Either one of the above propositions would have been fatal and the orators would have been compelled to take three thousand dollars out of the solvent company, and whatever percentage it could get out of the insolvent companies.

The answer of the petitioners (Record, p. 15, paragraph 5) says that—

"5th. This defendant is informed, and therefore admits, that C. "F. R. Jenne, of the said firm of Sherman & Jenne, visited the "premises described in the bill on the 25th day of August, 1883, "and saw the said building, but defendant denies that the said "Jenne made any agreement with the said Robert or the said Helen "M. at that time and place, such as is set forth in the bill."

The case shows that the above statement was in no place denied, and proves that no other or different contract was ever made between the parties than the written contract or binder.

III.

MATTERS IN DISPUTE.

The petitioners lay great stress on the matters in dispute, particularly matters that said petitioners disputed—

1st. The law as to the remedy. Orators could in no way prevent the petitioners from filing demurrers, however frivolous or unsound they might be.

Under the old English practice, where the defendants wish to interpose all the obstacles and defenses possible, the first thing to do is to file a demurrer, and there was no way that the orators could prevent it nor prevent them from filing a joint demurrer.

One thing is noticeable: when the petitioners filed their answers, August 19, 1884, said petitioners filed several answers. (Record, p. 2.) See also one of said answers, to wit, the answer of the Phœnix Insurance Company. (Record, pp. 14, 15, 16, 17, and 18.)

Then, again, the questions raised in said several answers by said petitioners and tried, to wit: "Whether the contract was not wholly "void because of the fraud of the insured in obtaining it; and also "whether should the contract be found to be untainted with fraud "the whole loss under it was not fraudulent" (see issues to jury, Record, pp. 18, 25 and 26), were questions that in no way affected the jurisdiction or right of appeal. They were questions which insurance companies, bound to make all defenses possible, can always raise in every case, and the orators can in no way prevent it.

All the orators can do in any such case is to meet them squarely

and show the falsity of such charges and that no ground exists on which to base any such questions. This the orators did.

This court has held that the answer of defendants cannot change the plaintiff's rights to bring any suit that he can legally sustain in his own way. Defendants' answer cannot make a joint suit several or a suit by one party against separate defendants joint as against said defendants.

Louisville, &c., R. Co., *vs.* Ide. Decided March 23, 1885. Reported in Albany Law Journal, July, 1885, page 77.

IV.

But the only real questions in dispute, and which this court are to decide, are these:

1st. Was this cause appealable? Did the court below err in disallowing the appeal upon the ground that the cause is not appealable? (Record, p. 31.)

The *decree* of the court below, together with the *bill of complaint* of the orators, are the records which govern this matter and all outside matters raised by the petition, and are for the purpose of confusing the mind and misleading the court, and are a hindrance rather than a help in deciding the question.

The decree (Record, pp. 30, 31) was in accordance with the prayer for relief in the bill of complaint. (Record, p. 10, paragraph 14.) See also opinion of Judge Wheeler. (Record, pp. 28, 29 and 30.)

The decree is in the words following, to wit:

"This cause came on to be further heard at this term, and was "argued by counsel, and thereupon, upon consideration thereof, it "was ordered, adjudged, and decreed that each of said defendants "pay to said orators the sum of three thousand dollars, with inter- "est thereon from the 29th day of August, A. D. 1883, amounting "to the sum of three thousand four hundred and thirty-three dol- "lars and fifty cents; that each of said defendants pay to said ora- "tors one-fourth of the orators' costs in and about this suit, said "one fourth being taxed and allowed at the sum of one hundred and "seven dollars and sixty-one cents, said sum due in equity and said "costs amounting to the sum of three thousand five hundred and "forty-one dollars and eleven cents, and which said sum, it is or- "dered, adjudged, and decreed, shall be paid to said orators within "thirty days from the 26th day of January, A. D. 1886, with inter- "est from the last-named date to the time of payment, and thereof

"the said orators may have execution at the expiration of said thirty "days against each of said defendants.

"Done in court in said term this 26th day of January, A. D. "1886.

"HOYT H. WHEELER."

2d. Have any exceptions been properly taken in the Circuit Court?

The answer of Judge Wheeler, the respondent, shows that none have been taken, on the law side, at the jury trial, and those have not in any manner been further brought before the Circuit Court upon the equity side.

THE AUTHORITIES.

The petitioners had no right to an appeal for the reason that the matter in controversy between the orators and each petitioner is only three thousand dollars and interest thereon from the 29th day of August, A. D. 1883, amounting to the sum of three thousand four hundred and thirty-three dollars and fifty cents; and it is well settled that "distinct and separate interests cannot be united for "the purpose of making up the amount necessary to give this court "jurisdiction on appeal.

Russell *vs.* Stansell, 105 U. S., 303.
See also Paving Co. *vs.* Mulford, 100 U. S., 147.
Seaver *vs.* Bigelow, 5 Wall., 208.
Rich *vs.* Lambert, 12 How., 347.
Strattan *vs.* Jarvis, 8 Peters, 4.
Oliver *vs.* Alexander, 6 Peters, 143.

Joinder of defendants is frequently allowed where the same decree must be entered as if the suits were separate and in the case above cited.

Paving Co. *vs.* Mulford, 100 U. S., 147, the Court say:

"We think it clear that we have no jurisdiction in this case. "Although many defendants have been brought into the suit, the "proceeding is in fact against each of the several purchasers to en- "force his separate and distinct liability. It is a joinder of distinct "causes of action against distinct parties. The same decree is to be "entered in each as in case of separate suits. The recovery, if any, "must be against each defendant separately for the amount he may "personally be found accountable. Such being the case, the value "of the matter in dispute with each defendant must be the sum for

"which he is separately liable. It is well settled that neither co-
"defendants nor co-complainants can unite their separate and dis-
"tinct interests for the purpose of making up the amount necessary
"to give us jurisdiction or an appeal. In such cases the appeal of
"each separate defendant or complainant must stand or fall accord-
"ing as his own interest in the controversy exceeds or falls short of
"our jurisdictional amount."

In the case of Shields *vs.* Thomas, 17 Howard, page 3, Judge Taney in his opinion lays down the dividing line between cases appealable and not appealable, viz: That where the several parties are jointly liable, then an appeal will lie, but where the defendants have no common liability for the amount due to the plaintiff, then an appeal will not lie, and the learned judge cites and approves the cases of Strattan *vs.* Jarvis, 8 Peters, 8, and Spear *vs.* Place, 11 How., 525, in which cases appeals were disallowed for the reason that the separate and individual interest of each appellant did not come up to the required amount.

The doctrine laid down in Shields *vs.* Thomas was reviewed and approved in *Ex-parte* Baltimore & Ohio R. R. Co., 106 U. S., 5.

The same principle was cited and approved in the case of Hanly *vs.* Fairbanks, 108 U. S., 543.

In that case an appeal was disallowed all the parties whose individual separate interests were less than five thousand dollars, and an appeal was allowed to all parties whose separate interests were over five thousand dollars.

But the cases of Schwed *vs.* Smith, 106 U. S., 188, and Fourth Nat. Bank *vs.* Strait and others, 113 U. S., 684, are more analagous to the case at bar than any of the other cases. In those cases the judgment creditors had claims amounting in all to much more than five thousand dollars, and the right of each one of said creditors depended upon the same identical state of facts. All the judgment creditors were parties, and the whole matter was adjudicated by a single suit to save a multiplicity of suits, but an appeal was denied for the sole reason that each creditor had a distinct and separate claim upon which he could maintain a distinct and separate cause of action. So in the case at bar, the orators might have sustained four distinct and separate suits against the four insurance companies mentioned in said binder.

This same question was before this court in the case of Stewart *vs.*

Durham, 115 U. S., 61; also, Reporter, vol. 20, 609. In that case it was claimed that "this court has no jurisdiction of the appeal "for the reason that the decrees in their favor are severed, and that "the amounts adjudged to be paid to them respectively do not ex- "ceed the sum of five thousand dollars."

And the decision of this court sustained that claim and disallowed the appeal as to all parties whose several decrees in their favor were less than five thousand dollars.

The case of Stewart *vs.* Durham is so directly in conflict with the claim made in this petition that even the attorney of the petitioners thinks it fatal and almost too great a stretch of the imagination to claim that it is not an analagous case, and on the whole deems it more proper to attempt to have it overruled, and therefore in petitioners' brief, page 7, he attempts to explain the errors in that decision.

The apprehension in petitioners' brief, or at least to be inferred in said brief, that this petition cannot stand in view of the decision in Stewart *vs.* Durham is in our judgment well founded.

Within the last few years the question whether judgments in favor of or against distinct parties, though in the same record, could be joined, has been before the court frequently and always decided in the negative. The later decisions are much more decided than the earlier cases, and in the case of Chatfield *vs.* Boyle an appeal was denied where the cause of action was the same as to all the parties, and that case is similar in many respects to the case at bar.

Chatfield *vs.* Boyle, 105 U. S., 231.
See, also,
Terry *vs.* Hatch, 93 U. S., 44.
Farmers' Loan & Trust Co. *vs.* Waterman, 106 U. S., 265.
Adams *vs.* Crittenden, 106 U. S., 576.

The case of Market Company *vs.* Hoffman, 101 U. S., page 112, is cited in support of this petition. In that case Justice Strong says:

"The first question to be determined is whether the amount in "controversy is sufficient to give us jurisdiction of the appeal. Upon "this we have no doubt. While it may be true that if Hoffman

"was the sole complainant the amount in controversy would be in-
"sufficient to justify an appeal either by him or the company, the
"case is one of two hundred and six complainants suing jointly, the
"decree is a single one in favor of them all and in denial of the
"right claimed by the company, which is of far greater value than
"the sum which by act of Congress is the limit below which an ap-
"peal is not allowable. It is averred under oath in the pleadings
"that the sale which the company proposed to make, and the court
"below enjoined, would have realized the company more than sixty
"thousand dollars. Of this benefit the decree deprives them. It
"is very plain, therefore, that the appeal is one within our jurisdic-
"tion."

After examining this opinion we discover that said case bears a similar resemblance to the case at bar that oil does to water, and so with the other cases cited in support of petition. None of them are analagous to the case at bar.

We claim that the case at bar is different from the cases in which an appeal has been allowed in this respect: The amount due the orators is the sum of three thousand dollars and interest thereon from each one of said insurance companies, and there is no common, collective or joint liability of said petitioners to pay the whole amount.

But of what use would it be, even to the petitioners, to have this case in the United States Supreme Court?

1. No appeal ever having been taken to the decision of the Circuit Court overruling the demurrers, that decision could not be revised in any way in this court.

2. The trial by jury was granted petitioners by the Circuit Court upon their own application or motion, and was opposed by the orators.

Upon that trial some exceptions were taken; but, as shown by the answer of Judge Wheeler, the respondent, were never brought before the Circuit Court upon the equity side by the petitioners, nor any one else. They cannot now be heard in this court.

3. The value of the property destroyed by fire was ascertained by a special master, by consent and agreement of the parties, and no exceptions or appeal were taken thereto.

What, then, is there for this court to hear and determine?

All the petitioners have attempted to appeal from is the final decree.

The Circuit Court did not make any decree till after the orators had failed to make any defense, either in law or equity.

MARTIN H. GODDARD,
For the Respondent.